HENRY WHEATON AND ROBERT DONALDSON, APPELLANTS v. RICHARD PETERS AND JOHN GRIGG.

Copyright. From the authorities cited in the opinion of the court, and others which might be referred to, the law appears to be well settled in England, that, since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute; and that notwithstanding the opinion of a majority of the judges in the great case of Miller v. Taylor was in favour of the common law right, before the statute; it is still considered in England as a question by no means free from doubt.

That an author at common law has a property in *his manuscript*, and may obtain redress against any one who deprives him of it, or by obtaining a copy endeavours to realize a profit by its publication, cannot be doubted: but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument, that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realizes this product in the sale of his works, when first published.

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long and perhaps as usefully to the public, as any distinguished author in the composition of his book. The result of their labours may be equally beneficial to society; and in their respective spheres, they may be alike distinguished for mental vigour. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly. It would seem therefore that the existence of a principle which operates so unequally, may well be doubted. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its rules must conform to sound reason.

That a man is entitled to the fruits of his own labours must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property which regulate society, and which define the rights of things in general.

It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law. There is no principle which pervades the union, and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our system by legislative adoption.

When a common law right is asserted, we look to the state in which the controversy originated.

When the ancestors of the citizens of the United States migrated to this

country, they brought with them, to a limited extent, the English common law, as part of their heritage. No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. It was adopted only so far as its principles were suited to the condition of the colonies: and from this circumstance we see, what is the common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced, and sanctioned in each.

If the common law, in all its provisions, has not been introduced into Pennsylvania, to what extent has it been adopted? Must not this court have some evidence on the subject? If no copyright of an author, in his work, has been heretofore asserted there, no custom or usage established, no judicial decisions been given; can the conclusion be justified, that, by the common law of Pennsylvania, an author has a perpetual property in the copyright of his works. These considerations might well lead the court to doubt the existence of this law; but there are others of a more conclusive character.

In the eighth section of the first article of the constitution of the United States it is declared, that congress shall have power "to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and inventions." The word "secure," as used in the constitution, could not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors: and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.

It is presumed, that the copyright recognized in the act of congress, and which was intended to be protected by its provisions, was the property which an author has, by the common law, *in his manuscript*, which would be protected by a court of chancery; and this protection was given, as well to books published under the provisions of the law, as to manuscript copies.

Congress, by the act of 1790, instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time by the provisions of that law.

The right of an author to a perpetual copyright, does not exist by the common law of Pennsylvania.

No one can deny, that where the legislature are about to vest an exclusive right in an author or in an inventor, they have the power to provide the conditions on which such right shall be enjoyed; and that no one can avail himself of such right, who does not substantially comply with the requisites of the law. This principle is familiar as it regards patent rights; and it is the same in relation to the copyright of a book. If any difference should be made, as respects a strict conformity to the law, it would seem to be more reasonable to make the requirement of the author, rather than of the inventor.

The acts required by the laws of the United States, to be done by an author to secure his copyright, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes, must be inserted in the first or second page; *then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the department of state.*

[Wheaton and Donaldson v. Peters and Grigg.]

It has been said, these are unimportant acts. If they are indeed wholly unimportant, congress acted unwisely in requiring them to be done. But whether they are unimportant or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature, the court can only know by their official acts. Judging of those acts by this rule, the court are not at liberty to say, they are unimportant, and may be dispensed with. They are acts which the law requires to be done; and may this court dispense with their performance?

The security of a copyright to an author, by the acts of congress, is not a technical grant of precedent and subsequent conditions. All the conditions are important: the law requires them to be performed, and, consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests; and this was essential to its protection under the statute: but other acts are to be done, unless congress have legislated in vain, to render this right perfect. The notice could not be published until after the entry with the clerk; nor could the book be deposited with the secretary of state until it was published. But they are acts not less important than those which are required to be done previously. They form a part of the title; and until they are performed the title is not perfect.

Every requisite under both the acts of congress relative to copyrights, is essential to the title.

The acts of congress authorizing the appointment of a reporter of the decisions of the supreme court of the United States, require the delivery of eighty copies of each volume of the reports to the department of state. The delivery of these copies does not exonerate the reporter from the deposite of a copy in the department of state, required under the copyright act of congress of 1790. The eighty copies delivered under the reporter's act, are delivered for a different purpose, and cannot excuse the deposite of one volume as especially required by the copyright acts.

No reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court: and the judges of the court cannot confer on any reporter any such right.

APPEAL from the circuit court of the United States for the eastern district of Pennsylvania.

The case as stated in the opinion of the court was as follows:

"The complainants in their bill state, that Henry Wheaton is the author of twelve books or volumes, of the reports of cases argued and adjudged in the supreme court of the United States, and commonly known as 'Wheaton's Reports;' which contain a connected and complete series of the decisions of said court, from the year 1816 until the year 1827. That before the first volume was published, the said Wheaton sold and transferred his copyright in the said volume to Matthew Carey of Philadelphia; who, before the publication, deposited a printed copy of the title page of the volume in the clerk's office of the district court of the eastern district of Pennsylvania, where he

resided. That the same was recorded by the said clerk according to law, and that a copy of the said record was caused by said Carey to be inserted at full length in the page immediately following the title of said book. And the complainants further state, that they have been informed and believe, that all things which are necessary and requisite to be done in and by the provisions of the acts of congress of the United States, passed the 31st day of May 1790 and the 29th day of April 1802, for the purpose of securing to authors and proprietors the copy-rights of books, and for other purposes, in order to entitle the said Carey to the benefit of the said acts; have been done.

"It is further stated, that said Carey afterwards conveyed the copyright in the said volume to Matthew Carey, Henry C. Carey and Isaac Lea, trading under the firm of Matthew Carey and Sons; and that said firm, in the year 1821, transferred the said copyright to the complainant, Robert Donaldson. That this purchase was made by an arrangement with the said Henry Wheaton, with the expectation of a renewal of the right of the said Henry Wheaton under the provisions of the said acts of congress; of which renewal he, the said Robert Donaldson, was to have the benefit, until the first and second editions of the said volume which he, the said Donaldson, was to publish, should be sold. That at the time the purchase was made from Carey and Sons, a purchase was also made of the residue of the first edition of the first volume, which they had on hand; and in the year 1827 he published another edition of said volume, a part of which still remains unsold.

"The bill further states, that for the purpose of continuing to the said Henry Wheaton the exclusive right, under the provisions of the said acts of congress, to the copy of the said volume for the further term of fourteen years, after the expiration of the term of fourteen years from the recording of the title of the said volume in the clerk's office as aforesaid; the said Robert Donaldson, as the agent of Wheaton, within six months before the expiration of the said first term of fourteen years, deposited a printed copy of the title of the said volume in the clerk's office of the district court of the southern district of New York, where the said Wheaton then resided; and caused the said title to be a second time recorded in the said clerk's office; and also caused a copy of the said record to be a second time published

in a newspaper printed in the said city of New York, for the space of four weeks, and delivered a copy of the said book to the secretary of state of the United States; and that all things were done agreeably to the provisions of the said act of congress of May 31st, 1790, and within six months before the expiration of the said term of fourteen years.

"The same allegations are made as to all the other volumes which have been published; that the entry was made in the clerk's office and notice given by publication in a newspaper, before the publication of each volume; and that a copy of each volume was deposited in the department of state.

"The complainants charge, that the defendants have lately published and sold, or caused to be sold, a volume called 'Condensed Reports of Cases in the Supreme Court of the United States,' containing the whole series of the decisions of the court from its organization to the commencement of Peters's Reports at January term 1827. That this volume contains, without any material abbreviation or alteration, all the reports of cases in the said first volume of Wheaton's Reports, and that the publication and sale thereof is a direct violation of the complainants' rights, and an injunction, &c. is prayed.

The defendants in their answer deny that their publication was an infringement of the complainants' copyyright, if any they had; and further deny that they had any such right, they not having complied with all the requisites to the vesting of such right under the acts of congress."

The bill of the complainants was dismissed by the decree of the circuit court; and they appealed to this court. (*a*)

The case was argued by Mr Paine and Mr Webster, for the appellants; and by Mr Ingersoll, by a printed argument, and Mr Sergeant, for the defendants.

Mr Paine, for the appellants, contended:

1. An author was entitled, at common law, to a perpetual property in the copy of his works, and in the profits of their

(*a*) The case was decided in the circuit court by Judge HOPKINSON, Mr Justice BALDWIN having been absent on the argument and decision thereof. The opinion of Judge Hopkinson is inserted in the Appendix, No. II.

publication; and to recover damages for its injury, by an action on the case; and to the protection of a court of equity.

The laws of all countries recognize an author's property in his productions. In England, beyond all question, an author had, at common law, the sole and exclusive property in his copy. This was decided in Miller v. Taylor, 4 Burr. 2303. This property was placed by its defenders, and they finally prevailed, upon the foundation of natural right; recognized by the laws, ordinances, usages and judicial decisions of the kingdom, from the first introduction of printing.

The opponents of literary property insisted, that an author had no natural right to his copy; and resorting to those laws which are supposed to have governed property before the social compact, they maintained, that because the copy was incapable of possession it was impossible to have property in it. Mr J. Yates, the great opponent of literary property, and who has probably said all that ever was or can be said against it, urges that it is impossible to appropriate ideas more than the light or air (4 Burr. 2357, 2365); forgetting that books are not made up of ideas alone, but are, and necessarily must be clothed in a language, and embodied in a form, which give them an individuality and identity, that make them more distinguishable than any other personal property can be. A watch, a table, a guinea, it might be difficult to identify; but a book never. Cited Blackstone's Commentary and Christian's notes, to show the nature of literary property.

The court are referred to the able opinions of Willis, J. Aston, J., and Lord Mansfield, in Miller v. Taylor, 4 Burr. 2310, 2335, 2395. They agreed not only, that an author had a property at common law, but that it was perpetual: notwithstanding the statute of Anne.

Not long after that decision, however, the question as to the perpetuity of an author's property, was brought before the house of lords; and it was there decided, that it was not perpetual, its duration being limited by the statute of Anne. Yet even upon this point, the twelve judges were equally divided (if we include Lord Mansfield, who did not vote, as he was a peer), and there were eleven out of twelve who maintained, that an author had a property at common law, in his copy. See Donaldson v. Beckett, 4 Burr. 2408; 2 Br. P. C. 129.

The decrees of the star chamber show, that that court admitted and protected authors, as early as 1556. Maugham 12, 13. Ordinances of parliament, as early as 1641, recognize and protect the owner's property in his copy. These ordinances were several times repealed. Maugham 13, 14. In 1662 and 1679, acts of parliament were passed, prohibiting any person from printing, without the consent of the owner of the copy. Maugham 15, 16.

In the reign of Charles II., there were several cases in the courts, in which the ownership of the copy by authors, is treated as the ancient common law: and in one case, the case in Croke's Reports, the right of the author was sustained, even against the claim of the king's prerogative to publish all law books. Chief Justice Hale presided. Maugham 19; 4 Burr. 2316.

In the reign of Anne, when the perpetual ownership of literary property was thus firmly established, the booksellers, annoyed by the piracy of unprincipled and irresponsible adventurers, applied to parliament for protection. A bill was accordingly brought in for the purpose, entitled "an act to secure the property of authors." In committee, its title was changed to that of "an act to vest authors with their copies, for the times therein mentioned." Maugham 20—27. And the act declared, that authors should have an exclusive right for twenty-one years and no longer. In this shape it was passed.

Notwithstanding the strong and explicit terms of the statute of Anne, both as to vesting the author with his right, and limiting its duration, (terms not to be found in our act); the courts, by an uninterrupted series of decisions, from the passing of the statute down to the case of Donaldson v. Beckett, maintained, that an author still had his original perpetual common law right and property; and we have seen, that had Lord Mansfield voted in that case, the twelve judges would have been equally divided.

For a review of the common law property of an author, and of the legislation upon the subject in England and the United States, cited, the American Jurist, vol. 10, p. 61, &c., No. for July 1833.

2. The common law property of an author is not taken away by the constitution of the United States. The states have not

surrendered to the union their whole power over copyrights, but retain a power concurrent with the power of congress; so far, that an author may enjoy his common law property, and be entitled to common law remedies, independently of the acts of congress. It is one of those concurrent powers, where the power of the state ceases, only when it actually conflicts with the exercise of the powers of congress.

In the constitutional clause relating to the rights of authors and inventors, there are two subjects, distinct enough in themselves, and only united by the form of expression. This comprehensiveness of expression, we know, belongs to the constitution; and that the aim of its framers was brevity. The expression is not so important, for in that instrument we are to look for substance and intention.

Although united in this clause, and for the same purpose of being secured by congress, the subjects of patents and of copyrights have little analogy. They are so widely different, that the one is property, the other a legalized monopoly. The one may be held and enjoyed without injury to others; the other cannot, without great prejudice. The one is a natural right, the other in some measure against natural right.

But because they both come from invention or mental labour, and in addition, because they are so joined in the constitution; we have become accustomed to regard them as in all respects alike, and equally dependent on the legislative favour for existence and protection.

Upon this point the counsel for the appellants argued at large, that the principles which applied to copyrights were different from those which regulated the property of inventions secured by a patent. That they were inserted in the clause of the constitution for brevity and comprehensiveness. That the framers of the constitution probably designed to give congress the complete and exclusive power over patents; but it did not follow from this, that the same was introduced in relation to copyrights.

It is important to examine the true rules of construction which are applicable to this clause in the constitution.

This is the first instance in which this court has been called upon to pronounce, whether the power given in this clause is an exclusive or a concurrent power; or as to the extent of the

power conferred by it on congress. Consequently the rules established as to the construction of that instrument, have all been in relation to other powers, and powers of a very different character.

All the other powers in the constitution conferred on congress or yielded by the states, are national or political, and for national and political purposes. This is the only instance of a power being conferred, unless incidentally, over private property. This is a power over private property, not incidental to a national power, but with an immediate, primary and single reference to the property. The rule of construction as to the grant of the political and national powers may not be suited to this. It has been held as to them, that a rule of strict construction was not to be adopted.

But the question here is as to private right. And the question is whether the constitution takes away a private right, or property at common law. And why should we not apply the same rule of construction to such a constitutional provision, as we do to a statute, in derogation of common law right? The rule is, that such statutes are to be construed strictly, because they abridge the right. The reason of the rule extends to the constitution, whenever it is in derogation of common right. For this rule see 10 Mod. 282; 4 Bac. Ab. 550, 650.

Other common law rules in relation to statutes affecting private rights or common law rights, would seem to be peculiarly applicable to this clause of the constitution; although they may not be generally referred to as guides in construing the constitution. These will be found in 1 Bl. Com. 87; 1 Inst. 111, 115; 1 Bl. Com. 89; Plowd. Rep. 206; 13 Mod. 118; Plowd. 113; 1 Bac. 11, 18, 38; 1 Bac. 3, 5; 2 Burr. 803, 805; Com. Dig. Action on Stat. C. G.; Salk. 212; 19 Vin. Ab. Stat. E 6; 1 Story's Com. 436, 384, 387, 397, 411, 401; Martin v. Hunter, 1 Wheat. Rep. 326, 410.

With these general guides of construction, it is inquired whether the power granted to congress by the constitution transfers the whole subject of property of authors to the exclusive authority and control of congress; so that the property of an author ceases to exist at all, without the legislation of congress: or whether it leaves the author in the enjoyment of his

property, as he had it before the adoption of the constitution; and merely attempts to improve what was supposed to be an imperfect enjoyment by authorizing congress to *secure it.*

This is not the question whether the power is concurrent or exclusive. If the author's common law property is not taken away, nor made wholly dependent upon the legislation of congress; but if congress possess the mere partial power to secure it, then the property remains as at common law, subject to state legislation, and the auxiliary legislation of congress. The question now is simply as to a right of property. If we take the rules above cited from Mr Justice Story's Commentaries as guides of interpretation; can there be a question as to the nature of the delegation of power, or its extent or amount? The delegation is to secure exclusive rights; not to grant property or confirm property, or grant rights or confirm or establish rights, but to secure rights.

We are willing to admit that this language is broad enough, and is adapted to transfer to congress the whole legislation and control over patents. There is at common law no property in them; there is not even a legal right entitled to protection. They have a moral or equitable right, but unknown to the law. Congress, therefore, when authorised to secure their rights, are authorised to do every thing; and full power over the subject is delegated to them.

But it does not follow, that because congress are authorised to create de novo, and to secure the right to patents by mere force of the word *secure*, that they are therefore authorised by force of that word to create de novo, and then secure copyrights. For a very different process would then take place in relation to the two things. In creating patents they take nothing away. They deprive the inventor of no property. He had nothing, and they gave him all merely by securing. But if by the word *secure*, they are authorised to give an author all that he is afterwards to possess, the operation effects a total deprivation of his common law property. So that to allow the word "secure," to confer the same power over copyrights, as over rights to inventions, is to make it a word of totally different meaning and import in the one case, from the other. The language is not broad enough, nor is it adapted to the taking

away of property or pre-existing rights. We are therefore to reject the argument, that a copyright must exist and be held solely under the constitution; because patent rights must be.

What is there then in the delegation of the power to *secure* an author's exclusive rights, which should be construed to deprive him of his property, and make him dependent wholly on the security provided? Are not the words in themselves plain and clear; and is not the sense arising from them distinct and perfect? and if so, is interpretation admissible? and if not, is not the question settled? For it never can be pretended that the naked words, authorising congress to secure rights, take away or affect the property in which those rights exist.

There would seem to be nothing, therefore, in the plain meaning of the word *secure*, which should alter, affect, or take away an author's property in his writings. Indeed, it seems too plain to admit of argument, that when the constitution authorises congress to secure an acknowledged pre-existing right, and does not authorize them to grant it; it is an express declaration that it subsists, and is to subsist, independently of their power.

But it may be said, that all the author can ask, or have, is security for his rights, and that this is all he had at common law: and that the constitutional clause does not take away his security, or any part of it, but only transfers to congress the power and duty to secure him, which before belonged to the states.

We answer, that if this construction is derived from the import of the words themselves, it is strained beyond all bounds allowed by the rules of construction. There is the strongest reason to believe, from the language of the constitution, that those who framed it, adopted it with a particular view to preserve the common law right to copyrights untouched. If this clause in the constitution is to be construed as taking away the author's common law right, it deprives him of a part of the security he had at common law; and does more than merely transfer to congress a power and duty which before belonged to the states. It is, then, asked, whether the word *secure* can be found to possess any such meaning as to take away, and diminish, and disturb, either by the common law or constitutional rules of construction.

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The meaning of the clause of the constitution, when tried by the usual rules of interpretation, is shown to be as contended by the appellants. Cited, 19 Viner's Abr. 510, E. 6; and see 2 Inst. 2d ed.; Plowden 113; 1 Ch. Pl. 144; Almy v. Harris, 5 Johns. Rep. 175; The President, &c. of the Farmers' Turnpike Road v. Coventry, 10 Johns. Rep. 389.

Chief Justice Marshall (12 Wheat. 653, 654) lays great stress on the framers of the constitution having been acquainted with the principles of the common law, and acting in reference to them. Most of them were able lawyers; and certainly able lawyers drew up, and revised the instrument. Are we, then, to believe, that if they had any design to take away the common law right, or to authorize congress to take it away or to impair it; they would, knowing the rules of construction cited, and like common law maxims, have used the language they have? There is the strongest reason to believe, from the language, it was adopted for the purpose of preserving it, and to reserve from congress any power over it. This probability arises, almost irresistibly, from the language used; and under the circumstances that it was used.

The case of Donaldson v. Beckett was decided in the house of lords in 1774. This case, and all the law on this subject, discussed and decided by it, must have been known to the lawyers of the convention. The opinion of the judges in the case of Miller v. Taylor, must also have been familiar to them.

From the statute of Anne, then, down to 1774, there had been in England a continual contest about the words of that statute, and whether it was a statute to secure a right already existing. It agitated the literary world especially, because it belonged to them; and it agitated the courts. Cases of unequalled importance arose out of, and were decided upon the use of these words. Yeates, J. calls the case of Miller v. Taylor, a case of "great expectation." This case occurred in 1769, and immediately followed the still greater case of Donaldson v. Beckett, in which the twelve judges gave each an opinion in the house of lords. These cases, therefore, occurred and were reported a few years before the adoption of the constitution.

Had the convention designed to take away, or to authorize congress to take away the common law property, they would

have used the words *vest*, or *grant;* and would have carefully avoided the word *secure*.

But what reason can be discovered why the framers of the constitution should wish, or intend to take away, or authorize congress to take away the common law right. What was the mischief they had in view?

Will it be said that the public have rights as well as the author; and that it is impolitic to allow a perpetual right? Suppose we grant it. Yet, what has the constitution to do with a mischief like this? It does not require a national power to cure it. The states were fully adequate to provide a remedy themselves. And the states gave congress no powers, which they could as well exercise themselves. Will it be pretended that the states could not regulate, limit or take away the right within their own territories; and that it was necessary to empower congress to do it?

Will it be said that it was designed to take from the states their power over copyright, lest, if a state were to protect the rights of authors, the citizens of other states might be curtailed of their rights within that state? The answer is obvious. No person can have any rights opposed to the author's. He has the property, and it cannot stand in the way of another's property or rights. Besides, the objection goes to the whole of state legislation on any subject: for a state may, by its laws, curtail or affect the rights of citizens of other states, in other particulars, and why be so careful to prevent them in this? As we have already shown, copyrights have, in these respects, none of the mischiefs attending them which attend a right to inventions.

There could be but one possible motive for making copyrights a national concern; and that was because the states might not, or could not, individually, afford them a just protection. From this single motive, what intention are we to infer? That, and that only, apparent on the face of the constitution. An intention to secure the right.

Why is it, however, that if the public good was had in view, by the framers of the constitution, and not the author's benefit singly, either as regards patents or copyrights, that they did not undertake to guard the citizens of the several states against the protection which the states might afford to inventions intro-

duced from abroad. For that, as well as for the printing of foreign books, a state might, if it chose, grant monopolies. But this, and other mischiefs to spring from state legislation, it was thought proper to provide against.

It is contended that the case of copyrights is one within the concurrent powers of the United States, and the states. It is not within either of those kinds of exclusive powers enumerated in the Federalist (No. 34), but belongs to the other class of powers.

What is the power here? A power to *secure* the right of authors. And the question is whether the states may not protect and enforce the common law right, while the United States secure it. Is such a power totally and absolutely contradictory and repugnant? Is it not, on the contrary, perfectly consistent with the other. It is as consistent as a common law remedy is with a statute remedy; it is the same thing. Both may exist and act in concert, and no conflict can occur, unless the state undertakes to deprive an author of what congress has secured to him. If that were a reason for taking away the state power, it would be a reason for depriving them of all power: for so long as they have power to legislate, they can pass laws to interrupt those of congress. It is impossible to imagine a case where a power of congress could receive so little interruption from the legislation of the states; because this is a power primarily over private right, and not for national purposes; and it is the only one of the kind in the constitution.

The opinions of this court have been uniform, that a concurrent power in cases like this, might exist and be exercised by the states. See Houston v. Moore, 5 Wheat. Rep. 48 to 56; also Mr Justice Story's Commentaries 421 to 433.

It is believed that if the states have resigned to congress their power over copyrights, and have none remaining in themselves, yet that they have given the power to congress with a qualification and limitation, and have confined it in their hands, as they had power to do, simply to securing the right of the author. If they have any power besides this, it is merely to abridge the period.

Next. Have congress impaired the author's right? That is, supposing the common law remedies to be gone, and that

the author can have no remedy unless he has published the record, and deposited the copy in the secretary of state's office.

It is answered that they have most essentially. They have entirely changed, and unnecessarily, the whole title which an author had at common law, and the evidence on which it rested. They have taken from him the natural common law title, and the evidence to support it; and have given him one of a most artificial and difficult character. And is not a man's title to property, his evidence of ownership, a part of the property itself, a part of its value? Is it not this which distinguishes real from personal estate, in some measure; and gives it a higher character? Suppose a man were to lose his title deeds, or one of them, what would be the value of his property?

What title had a man before the statute, and what has he now? Before the statute, it was sufficient for him to prove himself the author. This he could do by proof, in pais, in a thousand ways. The proof of this is easy and imperishable, because it is the natural proof. The name of the author on the book, possession and claim of title alone, or first publication, would be prima facie sufficient evidence. And these are inherent, and inseparable from almost every case, as a part of its natural incidents.

But suppose he must, as is contended, prove a compliance with the requisites of the statutes. He is driven from all his safe and easy common law proof. There can be no such thing as prima facie evidence offered. Must he prove the publication for four successive weeks, forty-two years after it was made? Is he to keep a file of newspapers, and if he does, what proof has he of publication? How is he to prove the delivery of the volume? The law provides for no record. He must call a witness, and then he cannot be safe for forty-two years, unless he files a bill to perpetuate testimony. The evidence in the case establishes the difficulty of such proof. Can a statute, which thus loads a right with burthensome and needless regulations, and makes it wholly dependent on accidental mistake or omission, where it was free from them both, be said not to impair an author's common law right of property?

If, then, congress have not the power to impair the author's propery, and if the requisites as to publication and delivery of

the copy, if made conditions precedent, do impair it; they are so far unconstitutional; and the appellants have a right to claim the benefit of the act without performing them.

4. A citizen of one state has the same common law property in his copy, in other states, as the citizens of these states can have; and the common law property exists in the state of Pennsylvania: consequently, the complainants are entitled to a copyright at common law in that state, and can have a remedy in the circuit court of the United States, for its violation, independently of the provisions of the act of congress; the citizenship of the parties giving the state jurisdiction.

The constitution of the United States provides, that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

The constitution, by this provision, designed to make, and does in fact make us one nation, living under the same laws. It designed to give to all the citizens of the United States, not merely the benefits and privileges secured to them by national laws, but the benefit of all the laws of all the states, and the privileges conferred by them. Under this provision, a citizen of New York has all the privileges of the laws of Pennsylvania, whatever they may be.

It is this provision which makes us one nation, and this only. It is this alone which gives to all the citizens of the United States uniform and equal civil rights throughout all the territories of the nation. Other constitutional provisions secure political advantages; but without this we should be a mere league, and not a nation. We should be several distinct nations. Vattel says (p. 159, book i. ch. 19), "the whole of a country possessed by a nation, and subject to its laws, forms, as we have said, its territories, and it is a common country of all the individuals of the nation."

In this sense of a nation, this provision of the constitution makes us one; and makes all the states the common country of all the individuals of the nation.

An author then, who is a citizen of one of the states, is entitled to have his property in his copy protected in every other state, according to the laws of such state; without the aid of any national law. The only question is, do the laws of the state give an author a property in his copy; for if they do, who

shall say he is not entitled to enjoy his property under such laws, as much as any other kind of property? Has not a citizen of New York a right to hold lands, or any other kind of property under the laws of Pennsylvania? And if that state were to attempt to deprive him of the same rights as her own citizens enjoy, would it not be a violation of this clause of the constitution? The truth is, a citizen of New York is, so far as all his civil rights and privileges are concerned, a citizen of Pennsylvania. See Mr Justice Story's Commentaries 674, 675.

An author's copyright at common law exists in Pennsylvania.

The American colonies brought hither, as their birthright and inheritance, the common law, so far as it was applicable to their situation. Judge Chase, in United States v. Worrall, 1 Dall. Rep. 384.

Chief Justice M'Kean, in 1 Dall. Rep. 67, says, the common law has always been in force in Pennsylvania. Statutes made before the settlement of the province have no force, unless convenient, and adapted to the circumstances of the country; all made since, have no force, unless the colonies are named. See also page 74.

There never was a statute in Pennsylvania relative to copyright; and the statute of Anne was passed after the settlement of that state: the common law therefore prevails there.

5. The publication of the record in the newspapers, and the delivery of the copy to the secretary of state, are not made conditions precedent at all by the acts of congress, or if at all, only as to the right to the security provided by the acts. A non observance of the statutory directions in these particulars, does not deprive the author of the ordinary remedies by an action on the case and bill in equity. Besides, the publication of the record, and delivery of the copy, were at most intended only as a means of notice of the author's right; and actual notice, in this case abundantly shown, dispenses with those modes of constructive notice.

After stating the particular provisions of the act of 1790, the counsel proceeded to argue, that, on the proper construction of the act, the publication of the record, or the delivery of the copy, is not in any way connected with the right; and the delivery of the copy has nothing to do, even with the penalties

and forfeitures imposed by it. The provisions of the act are, in some respect, similar to those of the statute of Anne; and it must have been drawn with reference to it. Congress, by this law, did not think proper to impose all the penalties which are found in the act of Anne; because they were engaged in discharging their constitutional power of *securing* the author's right.

The copy to the secretary of state is a mere donation from the author. Congress give him no equivalent for it. The clerk is paid for the record; and what do government give the author for the copy, but security? Have they a right to sell the security; to put a price on the exercise of their constitutional powers? What right does the constitution give them to require a donation from the author? And will it be believed, that they intended to forfeit his property if he did not furnish it?

The month which may elapse after the right attaches, and before publication, and the six months before depositing the copy; show, that these things are not conditions precedent.

Natural rights are generally known by their own incidents. Property always carries with it its own indicia of ownership; and literary property not less than any other. The superaddition of record evidence, the highest known to law and all that is required of ownership of real estate, was probably deemed sufficient by congress; and they, therefore, required no other of the right of an author. It would be a fair presumption, that when they had required enough, they would not go on to require a superfluity.

But the publication of the record and delivery of the copy have been held, by a very numerous, learned and able court, on full argument (the court of errors in Connecticut, composed of the twelve judges), to be only directory; and to have nothing to do with the author's right. Nicholas v. Ruggles, 3 Day's Rep. 145.

But it is said, that although the publication and delivery of the copy, are not conditions precedent by the act of 1790, they are made so by the act of 1802; and that this has been decided in the case of Ewer v. Coxe, 4 Wash. 487, as to the publication of the record.

The counsel then proceeded to comment on the decision of Mr Justice Washington, in the case referred to; denying that

the language said by him to be contained in the first section of the act of 1802, was contained in it; and asserting that the meaning of the words used in the section, had been strained by the judge. He contended, that the act of 1802 was not intended to operate on the provisions of the preceding law, but only to refer to them as established by that law. There is no enacting language in the latter law; and without enacting language, it can be no enactment.

It is the duty of this court, before it allows property to be sacrificed, even if the words of an act are clear and free from doubt on their face; to look carefully at the intention of the legislature, to look at the spirit of the law and its consequences, and at the old law, the mischief and the remedy.

The counsel then went into an examination of both the statutes, for the purpose of showing that, applying these principles, the construction of those acts should be such as was maintained by the appellants. In the course of this examination, he cited, 19 Vin. Abr. 510, E. 6; Plowd. 111; 2 Institutes 200; 1 Bl. Com. 87; University v. Beyer, 16 East 316; Postmaster General v. Early, 12 Wheat. 148.

The act of 1802 does not make the publication and delivery conditions precedent, because it is impossible they should be so. The first act vests the right on recording the title. It then gives two months to publish the record, and six months to deliver the copy. A condition precedent is an act to be done precedently; and it is impossible to publish the record until the record is first made, and the right attaches on making the record.

The act of 1802 declares that the author, "before he shall be entitled to the benefit of the act" of 1790, shall, "in addition to the requisites," &c. Now what was the benefit of that act? It is entitled an act to secure the author's right; and the power of congress is to secure the right, i. e. an existing right. How does the act secure the right? Only by penalties and forfeitures. It gives no action on the case, no bill in equity; and if it had given them, it would have been, as to them, wholly inoperative, for no court had jurisdiction of them. What then was meant by; what, in fact, was, the "benefit of that act?" Certainly the penalties and forfeitures; nothing else. We

claim the benefit of the act of 1819, which expressly gives a bill in equity, and the circuit court jurisdiction.

It is in vain to say that the acts in question are conditions precedent to the right. The right itself is recognised by the constitution and law, as an existing right; and the right is not given by the act, but is only secured by it. The security, as we have shown, is the penalties and forfeitures, which we do not now claim. The action on the case is a remedy founded on the right, and not on the statute which gives none. And this bill is founded on the right, and on the act of 1819. We, therefore, get neither the right nor remedy from the act of 1790; and what benefit do we claim from it?

In support of the construction thus contended for, were cited, Rules of Construction found in 6 Bac. Abr. 379, Statute 1, pl. 1; 383, pl. 4, 5; 387, pl. 6; 391, pl. 10; 19 Vin. Abr. 519, Statute E. 6, pl. 86; 520, pl. 96; 525, pl. 129; 524, pl. 119; 528, pl. 156; 5 Vin. Abr. Condition 2 a. pl. 2, 3, 4, 5; 528, pl. 154, 158.

It is agreed that the object of the requisites in the act is to give notice, and statutes, however strong their language or positive their enactments, which require things to be done for notice, are held not to apply; and that their provisions need not be complied with, where actual notice is proved. Such are the registry acts, and other similar acts, which declare that instruments shall be absolutely void if not recorded. Le Nevé v. Le Nevé, 2 Atk. Rep. 650; Jackson ex dem. v. Burgett, 10 Johns. Rep. 460; Jackson ex dem. v. West, 10 Johns. Rep. 466.

It is fully shown by the evidence that the defendant had notice; and a part of that evidence shows that the claim of the appellant, Mr Wheaton, was admitted.

The rule is that the provisions of the registry acts do not apply except in cases of bona fide purchasers. What is a bona fide purchaser? A purchaser without notice; no matter what his property, or his attempt to get it, has cost him. Is Mr Peters a *bona fide* purchaser?

It is objected that the record of some volumes is taken out as author and proprietor. In answer we say, it is the clerk's duty to make out the record; and we cannot be held to forfeit our property, because he has not done it correctly.

But the record is right. As author, and not having parted with the right, Mr Wheaton was also proprietor. The act is adapted to a proprietor as well as author, and to enable a proprietor who is not the author to secure a copyright. In our case Mr Wheaton is described as author, and the super-addition of proprietor is mere surplusage.

6. The directions of the acts of congress as to the publication of the record and delivery of the copy to the secretary of state; and the renewal of the right to the first volume have been complied with; and the complainants have offered all the proof they are bound to offer of those facts.

In support of these positions, the counsel referred to the evidence in the record.

As to the delivery of copies to the secretary of state, he stated, that the law is silent as to any proof. It directs no memorandum of the deposit to be made. The presumption, therefore, is, that none is made. And, in fact, they did not begin to make any until about the close of these volumes.

It appears, that certificates were given, sometimes, latterly. But the law does not direct them, does not know them; and why should one take them? Would they be evidence of any thing if he had them? And Mr Brent proves the greatest irregularity as regards certificates and memoranda. Mr Carey proves the same thing.

But the law does say, that the secretary of state shall preserve the copies in his office. This then is the evidence required by law, that the volumes have always been in his office, since within six months of their publication. And this is proved by Mr Brent's deposition. The volumes are and have been there. It is for them to show that they were not placed there by us under the law.

How can we prove, by parol, facts which occurred from sixteen to seventeen years before the proof taken in this cause? The proof must be by parol; and such proof the law presumes to be out of men's power after the lapse of six years. Without the copies having actually been found there, the law would presume that an act enjoined by law to be performed, was performed after such a lapse of time. It would presume it, in favour of right and natural justice against a wrong doer. See

a case of presumption, even of the enrolment of articles of apprenticeship, against positive evidence to the contrary. The King v. The Inhabitants of Long Buckley, 7 East 45.

But we have proved, positively, by the evidence of Mr Brent, that eighty copies of every volume were delivered under the reporter's salary act, within the six months after publication. The four acts of congress allowing the reporter his salary, also provide, that he shall within six months deliver eighty copies to the secretary of state; one of which he is to keep and transmit to his successor in office, of course to be preserved in the office.

The fact is, that eighty-one copies were sent, but the law giving the salary, not requiring more than eighty, the papers in the department under these acts speak of but eighty; and all being sent to the department together, is the reason why there was no minute, or memorandum, or certificate, as in some cases under the copyright law.

And is not this within the letter of the copyright law, the delivery of the eighty copies alone? And if we have complied with the letter of the law, ought it not to save us from a forfeiture of our property? Is it not within the spirit of the law? The judge in the court below insists it is for notice; the counsel insist it is for notice. And is it not as good notice, if it is there under one law, as under the other? But the judge who decided the case below says, that it is not required under the salary law to be kept in the office. It is submitted, that it is as much required to be kept there under one law as another. At all events, the condition, if it be a condition precedent, is substantially performed by it; and this, as has been shown, is sufficient.

The copyright for the first volume of Wheaton's Reports was renewed in New York, the place of residence of the author. This was done before the publication of any volume of the Condensed Reports, containing any of the matter in Wheaton's Reports. Mr Wheaton had not parted with his property in them; and by the third section of the act of 1790, it is required that the title shall be deposited, and the record made in "the clerk's office of the district court where the author shall reside."

Law reports, like other books, are objects of literary property;

and Mr Wheaton was the author of the reports in question in this case, and entitled to the copyright in them. The other complainant, Mr Donaldson, has a limited property in the copy by assignment from Mr Wheaton.

It was never doubted in England, that law reports were the subject of copyright. The only question was, whether the prerogative of the crown did not monopolize all law books, so as to exclude an author's right. Cited in support of this point, Roper v. Streater, Skin. Rep. 234; 4 Burr. 2316, 2403; Tonson v. Walker, 3 Swanston 673; 3 Ves. 709; 2 Bro. Parl. Cases 100.

The prerogative right, however, is now abandoned, and has long been in England. Maugham, 104, says, "it is now treated as perfectly ridiculous." Godson says the same thing (Patents 322, 323). See 4 Burrows 2415, 2416, as to the reason of the prerogative. It there appears the king introduced printing into England.

It is not necessary, however, to produce cases to prove a right so obvious, until cases are produced or principles established which show that it does not exist. There are necessarily but few cases, because the right has not been questioned. One fact is enough, without cases. We know the great price of law reports in England, and we know, of course, that but one person does publish, viz. the proprietor: that there are never contemporaneous editions of the same reports: that a single whole edition is exhausted before another is published, and sometimes lasts half a century. Why is this? Who prevents enterprize and cupidity from participating in this field? What can it be except the copyright?

As to the objection that the matter of which the report is composed is not original; we answer this is wholly unnecessary in copyright. There is no analogy in that respect between copyrights and patents. A man who makes an Encyclopedia may have a copyright, although he does not write a word of it. And in Carey v. Kearsley, 4 Esp. Rep. 168, where it was attempted to show that the survey in which the copyright was claimed, was made at the expense of the post office, and that the copyright belonged to the post office, Lord Ellenborough said, "I do not know that that will protect the defendant. At law the first publisher, even though he has abused his trust

by procuring the copy, has a right to it; and to an action against the person who publishes it without authority from him."

The salary of the reporter was never designed to be a compensation in full, and to deprive him of his copyright. Had such an effect been intended, or thought of, it would have been expressed. It stipulates an equivalent for the sum allowed him, or a greater part of it, viz. eighty copies. When congress, by the last reporter's act, reduced the price of the volume to five dollars, the copyright was considered.

Mr Wheaton published his first volume without a salary. He had been appointed reporter by the court, and was looking to the profits of the copy as his only compensation. But it was found unequal to the labour and time, and in truth no compensation. In this state of things, to enable him to go on, congress give him one thousand dollars (for which he gives them back eighty copies); and say nothing of its being an equivalent for his copyright. The copyright was established in England, and in this country, before the law was passed. And is established property to be taken away by implication? Does any one believe that Mr Wheaton would have spent half a year or more in making and publishing these reports, if he had supposed he had not the copyright? After deducting the eighty copies, the thousand dollars would not leave enough to pay the expenses of a gentleman in Washington during the term, and going and coming. Besides, he took steps to secure his copyright every year. It was considered a copyright book. Congress saw this and knew it. Their laws with him were contracts, made under a full knowledge of existing facts. And shall it be said, when they made no exception of the copyright, and knew that he relied on it, that they intended to deprive him of it? It would have been a fraud unworthy of congress; as it would have been disgraceful to an individual. Other reporters in this country, in the state courts, who had salaries, had always secured their copyright; (even Mr Peters has secured his), and the right to do so was never doubted.

Mr Wheaton published the first volume without salary; consequently this objection cannot apply to that.

As to the cases and abstracts, they are clearly Mr Wheaton's own composition. He acquired the right to the opinions by judges' gift. They invited him to attend at his own expense

and report the cases; and there was at least a tacit engagement on their part to furnish him with such notes or written opinions as they might draw up. This needs no proof: it is the course of things, and is always done. The mere appointment proves all this. Was this engagement, this understanding, ever altered? Do not the judges of this court know that Mr Wheaton believed he was acquiring a property in his reports? Did they not suppose he would be entitled to it, if he took the necessary steps to secure it?

Were not the opinions of the judges their own to give away? Are opinions matter of record, as is pretended? Was such a thing ever heard of? They cannot be matters of record, in the usual sense of the term. Record is a word of determinate signification; and there is no law or custom to put opinions upon record, in the proper sense of that term. Nor were they ever put on record in this case. They were given to Mr Wheaton, in the first instance. Blackstone, 1 Comm. 71, 72, shows that the reasons of the court are not matter of record.

The copy in the opinions, as they were new, original and unpublished, must have belonged to some one. If to the judges, they gave it to Mr Wheaton. That it did belong to them is evident; because they are bound by no law or custom to write out such elaborate opinions. They would have discharged their duty by delivering oral opinions. What right, then, can the public claim to the manuscript? The reporter's duty is to write or take down the opinions. If the court choose to aid him by giving him theirs, can any one complain?

But we allege and prove that Mr Wheaton was the author of the reports; that he published them. This is enough to entitle him to a copyright, until they prove that he is not. The burden of proof is on them. (See Carey v. Kearsley, 4 Esp. R. 168, already cited.)

It is contended that it is against public policy to allow reports to be copyrighted. And extravagant suppositions are made, as, that an author might destroy them, or never publish them, or put an unreasonable price on them.

Is one to be divested of property, is a common rule of law to be overthrown, because the imagination of man can devise a danger which may arise, however improbable? And besides, in this case the reporter would lose his salary; and in all cases

he must lose his place, if he were guilty of any of such absurdities.

As to enhancing the price, which is one of the evils apprehended, if the author were to do it unreasonably he would lose his place; and he must always do it to his own injury, for he would lose his sales and profit. In England, the statute of 54 Geo. III., amending the statute of Anne, omits the provision in the statute of Anne intended to prevent too high a price. This shows that experience had proved that no such evil was to be apprehended. In Germany, where a free, perpetual copyright exists, books are cheaper than any where else in the world. (Maugham 14, 15.)

Congress had power to apply the remedy, and they did apply it, when they thought proper, by fixing the price.

It is attempted to put judicial decisions on the same ground as statutes. It is the duty of legislators to promulgate their laws. It would be absurd for a legislature to claim the copyright; and no one else can do it, for they are the authors, and cause them to be published without copyright. Statutes never were copyrighted. Reports always have been.

It is said that one employed by congress to revise and publish the statutes, might as well claim a copyright as a reporter. The difference is, one is employed to act as a mere agent or servant, or clerk of the legislature, to prepare the laws to be properly promulgated. He is engaged to do what it is well understood never is copyrighted, and does not admit of copyright. There is a distinct understanding, a contract, that he is to do the work for his compensation, and not to claim a copyright. But a reporter is not an agent employed by congress. He is, and is understood to be engaged for himself, as principal; and congress buy eighty copies, and add a salary to his profit from his copy. He was doing before the act what it was understood he could copyright, and what he did copyright; and the act does not intimate that there was to be any change; and he went on copyrighting, and they renewed his salary without any objection or stipulation.

It is the bounden duty of government to promulgate its statutes in print, and they always do it. It is not considered a duty of government to report the decisions of courts, and they therefore do not do it. The oral pronunciation of the judg-

ments of courts is considered sufficient. Congress never employed a reporter, and they never gave any one any compensation, before Mr Wheaton. Mr Cranch reported without compensation, and relied upon his copyright; and Mr Wheaton continued, with a full understanding that he was to report in the same way.

Are the court prepared to deprive all the authors of reports in this country of their copyrights? Of property which they have laboured to acquire, with the full belief, of all others as well as of themselves, that they were to be legally entitled to it?

8. The publication of the defendants is a violation of the complainants' rights.

The quo animo of the publication is important. An abridgement was not contemplated; and the work was intended to be supplied at less cost. This is stated in the proposals annexed to the bill. The answer admits the decisions contained in the third Condensed Reports to have been previously published in Wheaton's Reports, and that it is intended to continue the publication of the same. It is denied in these papers that Mr Wheaton could have a copyright; and if he could, that he has taken the necessary steps to secure it.

The actual violation of the complainants' rights consists in having: first, printed the abstracts made by Mr Wheaton; secondly, in taking the statements of the cases made by Mr Wheaton, verbatim, from Wheaton's Reports; thirdly, in having taken points and authorities, and, in some instances, the arguments, and in all cases oral opinions from Wheaton's Reports, and for which, of course, no materials could be found elsewhere; fourthly, in having printed the whole of the opinions, which, it is not pretended, were found elsewhere. No resort was had to the records for the statements of the cases.

The Condensed Reports are not a fair abridgement. Cited, Butterworth v. Robinson, 5 Vesey 709; 1 American Jurist 157; Mangham 129 to 136.

The appellees submitted the following points, for the consideration of the court:

1. That the book styled "Wheaton's Reports," is not lawfully the subject of exclusive literary property.

2. If the book of reports of the complainants be susceptible of exclusive ownership, such ownership can be secured only by pursuing the provisions of certain acts of congress.

3. The provisions of the acts of congress have not been observed and complied with, by the complainants, or others, in their behalf.

4. Reports of the decisions of the supreme court, published by a reporter appointed under the authority of the acts of congress, are not within the provisions of the laws for the protection of copyrights. (*a*)

5. The entries of the copyrights by the appellant, claim more than Mr Wheaton was, in fact or in law, entitled to, as "author," "proprietor," "author and proprietor," and were for this cause void.

6. The work styled Condensed Reports, is not an illegal interference with the right, whatever it may be, in Wheaton's Reports.

Mr J. R. Ingersoll, for the defendants.

The defendants submit the following argument in answer to the complaint exhibited by the bill and testimony of the appellants.

They propose to show:

1. That the book styled "Wheaton's Reports," is not lawfully the subject of exclusive literary property.

2. If the book of reports of the complainants be susceptible of exclusive ownership, such ownership can be secured only by pursuing the provisions of certain acts of congress.

3. The provisions of the acts of congress have not been observed and complied with, by the complainants or others in their behalf.

1. The character of the work in which the right to literary property is asserted by the complainants, is sufficiently described in their own bill. It consists, they say, of twelve

(*a*) As the court gave no opinion upon this point, and, as the reporter has been informed, did not consider it when the case was disposed of, a great portion of the arguments upon it by the counsel for the appellees, has been omitted in this report. Should the case be brought again before the court, as it will be in the event of the issue directed by the court being found for the appellants, this point will be urged to a decision.

books of reports of the decisions of the supreme court of the United States. It was prepared in the due exercise of the appointment of Mr Wheaton as reporter, which he derived from the court. The writings or *memoranda* of the decisions were furnished by the judges to Mr Wheaton, who alone preserved the notes and opinions thus furnished to him, together with other materials compiled by himself; and having retained all these materials in his possession exclusively, he finally destroyed them. The work, agreeably to the description of it in the bill, is composed of "cases, arguments and decisions." However rich it may be in other materials, they are not made the subject of claim; nor is any interference with them alleged, or made in any degree the subject of complaint. The claim and complaint are confined to the *reports* properly so called. If the profession and the country are indebted to the individual exertions of the reporter for valuable notes, which may have been usefully inserted to increase his emoluments, or enlarge his literary reputation, they are not at all connected with the work as described and exclusively claimed in the proceedings before the court.

Reports are the means by which judicial determinations are disseminated, or rather they constitute the very dissemination itself. This is implied by their name; and it would necessarily be their nature and essence, by whatever name they might be called. The matter which they disseminate is, without a figure, the *law of the land.* Not indeed the actual productions of the legislature. Those are the rules which govern the action of the citizen. But they are constantly in want of interpretation, and that is afforded by the judge. He is the "*lex loquens.*" His explanations of what is written are often more important than the mere naked written law itself. His expressions of the *customary law*, of that which finds no place upon the statute book, and is correctly known only through the medium of reports, are indispensable to the proper regulation of conduct in many of the most important transactions of civilized life. Accordingly, in all countries that are subject to the sovereignty of the laws, it is held that their promulgation is as essential as their existence. Both descriptions of laws are within the principle. The source from which they spring makes no difference. Whether legislative acts, or judicial constructions or decrees,

knowledge of them is essential to the safety of all. A pregnant source of jurisdiction to the enlightened tribunal to which this case is now submitted, is altogether foreign to the enactments of the legislature. The extended principles of national law, and the rules which govern the maritime intercourse of individuals, are fairly and authoritatively known only as they are promulgated from this bench. It is therefore the true policy, influenced by the essential spirit of the government, that laws of every description should be universally diffused. To fetter or restrain their dissemination, must be to counteract this policy. To limit, or even to regulate it, would, in fact, produce the same effect. Nothing can be done, consistently with our free institutions, except to encourage and promote it. Every thing which the legislature or the court has done upon the subject is purely of that character and tendency.

The defendants contend, that to make "reports" the subject of exclusive ownership, would be directly to interfere with these fundamental principles and usages. They believe that no man can be the exclusive proprietor of the decisions of courts or the enactments of the legislature; and that nothing in the light of property in either can be infringed.

The two things being analogous, let the illustration of the one in controversy be derived from the one that is not. That a particular act of congress, or any number of acts of congress, could be made any man's exclusive property, has perhaps never been supposed. Yet the same labour is devoted to the construction of them—the same degree of talents is required for the due and proper composition of them. A particular individual receives them for publication, and the manuscripts may be said to belong to him; for "having retained such materials in his possession exclusively," as long as he had occasion for them, in every case it may probably be said, "he finally destroyed the same." This person is specially employed to publish the acts of congress. He does so, under an *appointment*, which has been deemed, by some learned judges, incompatible with the tenure of an office under one of the states. Where, then, does the parallel end? An individual may voluntarily publish an edition of the laws. But he does not by such publication make the *laws* his own. It is not necessary to determine whether he has or has not exclusive property in the

peculiar combination, or in the additional matter which his edition may contain. He certainly does not, by either combination or addition, appropriate to himself that which is neither the one nor the other; and his combination being untouched, and his additions discarded, a stranger may surely use as he pleases, that which at first was public property, and is public property still. Those acts themselves are no more the property of the editors, than the hall in which they were enacted is the property of the members who passed the laws.

If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by which we guide our actions. If there be any effect derived from the assertion, that the judges furnished their decisions to the reporter, the gift would be both irrevocable and uncontrollable, even by the judges themselves. The desires of the court to benefit the public, and the wishes and necessities of the public to receive the benefit, might alike be frustrated by a perverse or parsimonious spirit. A particular case, or a whole series of cases, might be suppressed by a reporter endowed with different feelings from those of the highly respectable complainant in this cause. It might become the interest of such a person to consign the whole edition to the flames, or to put it at inaccessible prices, or to suffer it to go out of print before the country or the profession is half supplied. These are evils incident to every publication which can be secured by copyright. Mere individual works, whether literary or religious, the authors can undoubtedly thus control. During the "limited time" for which they are constitutionally secured in an exclusive enjoyment of them, there is no remedy. Their right is perfect during that period. A similar right must exist, if at all, in the publisher of reports. Can such a power be asserted, with all its consequences, over the decisions of the highest judicial tribunal of the land?

We are not to be told, that the interest of the proprietor would secure the country against so great an evil. The law endeavours to prevent the occurrence of any possible wrong, although it may not anticipate the precise mode of accomplishing it. But there are contingencies readily conceivable when the interest of a venal reporter might be promoted by the course suggested. A party might feel it to his own advantage, and

therefore make it to the advantage of the reporter, to suppress a part, or the whole of the edition of his work. The law cannot and ought not to be made the prisoner or the slave of any individual.

It is proper here to draw a distinction between *reports*, the immediate emanations from the sources of judicial authority, and mere *individual dissertations*, or *treatises*, or even *compilations*. These may be of great utility, but they are not the law. Exclude or destroy them, and the law and the knowledge of it still exists. The same fountains from which the authors of them drew, are accessible to others. These private works may be regarded as so many by-paths to the temple of justice, smoothed and straightened by individual labour, and laid out for greater convenience over private ground. The owner may close them at his pleasure, and no one can complain. But the entrance to the great temple itself, and the highway that leads to it, cannot be shut without tyranny and oppression. It is not in the power of any department of the government to obstruct it.

The reports in England used to be printed with the express permission or allowance of the twelve judges prefixed. Probably it would have been held a contempt of court to print them without. We are told, that four reporters were formerly appointed by the king "to commit to writing, and truly to deliver, as well the words spoken, as the judgments and reasons thereupon given," in the courts of Westminster. 3 Croke's Reports, preface. When sergeant Henden *vouched for authority* Dalison's printed reports, Sir Henry Hobert "demanded of him by what warrant those reports of Dalison's came in print." 3 Croke's Reports, preface.

Sir James Burrow rebelled against the habit of receiving a special allowance or recommendation from the judges, preparatory to publication, and actually published without any allocatur. His preface, p. 8, which explains all this, also has a reference to the *property of the reporter*. But that has, evidently, no allusion to copyright property, for it refers to a proceeding previous to the publication by the reporter: viz. a surreptitious publication by some other person, "and after the surreptitious edition has been stopped by an injunction, the book has been

published, with consent of the reporter, without leave or license, and no notice taken or complaint made of it."

Reporting, however, in England, as it respects the common law courts at least, is a very different thing from reporting in this country. There the reporter has, with regard to the decisions themselves, a labour to perform which requires experience, talents, industry and learning: and he receives nothing from the judges to aid him in his task. Here (with respect to the opinions), he does nothing more than transcribe, if he does so much. And having received the manuscripts from the judges, if he should not himself publish them, they are withheld from the public, to the infinite detriment of the whole nation.

The cases that have been decided in England have, as it should seem, turned on a question of prerogative, and not of copyright.

Such was the point in the Company of Stationers v. Seymour, 1 Mod. 256. "Matters of state, and things that concern the government, were never left to any man's liberty to print that would. And particularly, the sole printing of law books, has been formerly granted in other reigns."

The case in 1 Vern. 120 (Anonymous), was a motion by the *king's patentees* for an injunction to stop the sale of English bibles, printed beyond sea. The lord keeper then referred to the circumstance, that a patent to print law books had been adjudged good in the house of lords.

In the case of Company of Stationers and Parker, Skinner 233, Holt arg.: "agreed that the king had power to grant the printing of books concerning religion or law, and admits it to be an interest, but not a sole interest." The court inclined for the defendant, (who had pleaded the letters patent of the king, which granted to the University of Oxford to print omnes et omni modo libros which are not prohibited to be printed, &c.) and they said that "this is a prerogative of power which the king could not grant so, but that he might resume it, but otherwise it is of a grant of an interest."

In Gurney v. Longman, 5 Ves. 506, 507, Lord Erskine declared that he granted the injunction (as to publishing the Trial of Lord Melville) "not upon any thing like literary property, but upon this only, that these plaintiffs are in the

same situation, as to this particular subject, as the king's printer, exercising the right of the crown as to the prerogative copies."

The cases of Bell v. Walker, 1 Bro. C. C. 451, and Butterworth v. Robinson, 5 Ves. 709, are not sufficiently developed, to show whether they turned upon copyright proprietorship, or a proprietorship derived from a prerogative grant.

It cannot be contended, with any semblance of justice, that the *mere opinions* of the judges, communicated to Mr Wheaton, as it is alleged they were, could be the subject of literary property. A book composed in part of those opinions, and in part of other matters, does not change the nature of the opinions themselves. An individual who thus mingles what cannot be exclusively enjoyed, with what can, does, upon familiar principles, rather forfeit the power over his own peculiar work, than throw the chain around that which is of itself as free as air. The intermixture, if it affect either description of materials, must render the whole unsusceptible of exclusive ownership. That which is public cannot, in its nature, be made private, but not *e contra*. The lucubrations of the reporter assume the hue of the authoritative parts of his book, and must abide by the result of a connexion so framed, and a colour so worn. Whether a stranger could extract the original parts in the face of a copyright, and publish them alone, it is not necessary to discuss. But upon the principles just asserted, he could give additional dissemination to the whole, as he finds it connected together. And he could, it is conceived, unquestionably select what is justly public property, and leaving the merely private work of the reporter untouched, publish the rest with entire impunity.

2. Our second point is, that the exclusive ownership of an author can be obtained only by pursuing the provisions of the acts of congress.

Upon this particular point, a moment's attention will be usefully given to the celebrated case of Miller v. Taylor, 4 Burr. 2303, and its companion, Donaldson v. Beckett, 4 Burr. 2408.

Judgment of the court of king's bench having been entered for the plaintiff, in Miller v. Taylor, a decree of the court of chancery was founded upon it in the case of Donaldson v. Beckett and others. This came before the house of lords on

an appeal, and the decree of the court of chancery (and, of course, Miller v. Taylor along with it, in principle) was reversed, "the lord chancellor seconding Lord Camden's motion to reverse." Besides the influence of the decision itself, we have the force of these professional opinions, and that of a majority of the eleven judges, who gave their sentiments, that the existence of the statute deprived the author of any right of action which he may have had at the common law.

The question of a common law right has not been decided favourably to the author; and if it had been, the existence of a statute is thus recognized as superseding both the right and the remedy which may have previously existed. The marginal note of Sir James Burrow to Miller v. Taylor, 4 Burr. 2303, itself is, "authors have *not* by common law the sole and exclusive copyright in themselves or their assigns in perpetuity after having printed and published their compositions," &c. If in England, the source and fountain of the common law, no such right exists, what can be alleged in favour of its existence in these United States? We contend that there could be no such common law right here, even if there were no statute: and that if there could be, it is incompatible with the provisions of the statute.

All the arguments contained in the powerful and splendid opinion of Mr Justice Yates in Miller v. Taylor, 2 Burr. 2354, are of irresistible force here.

Feudal principles apply to real estate. The notions of personal property of the common law, which is founded on natural law, depend materially on possession, and that of an adverse character, exclusive in its nature and pretensions. Throw it out for public use, and how can you limit or define that use? How can you attach *possession* to it at all, except of a subtle or imaginative character? If you may read, you may print. The possession is not more absolute and entire in the one case than the other. It is an artificial, and therefore arbitrary rule which draws the distinction; and in order to render it available, the lesson must be read in the statute, and the means must be resorted to which are there pointed out. Even in the face of a statute backed by the constitution itself, let an inventor lose his possession, and his privilege is gone. The

decision of this court as to the patent for fire hose, was to this effect. Pennock v. Dialogue, 2 Peters 1.

If the right secured by statute does not enable the owner to reclaim his lost possession, even when aided by the common law, (if it be so) how can the common law, independently of all statutes, avail?

Analogous rights, if such they may be called, are nothing without actual possession and use. Light and air, and a part of the great ocean, may be claimed and held, as long as necessary for the occupant; but abandon the immediate occupation, and the exclusive power and exclusive possession are gone together.

These and similar reasons contribute to show the source of literary property every where. They justify the positive provisions, and manifest the wisdom of them which give existence to it among ourselves. It is not to be found in natural law or common law, and the deficiency is wisely and aptly supplied.

The inconveniences to the public that would be the consequence of mere common law assertion of the right would be endless. It would lead to perpetual strife. If the mere individual stamp of authorship would afford even a foundation for a claim, originality might be pretended to by numerous individuals, and a test of truth might not be obtained. If the real author give his work the official stamp of originality before it goes forth into the world, most of the questions that would otherwise occur are anticipated. The source of exclusive ownership is therefore found in positive enactments, and not in any unwritten law.

What *is* the common law of the United States? To sustain a copyright it must be a very different thing from what the sages of the American law have supposed. To construe existing laws and contracts, to aid in giving them effect, to furnish lucid definitions, sound principles and apt analogies, it is rich in the most important uses. For all these and various other purposes it is indispensable. Most of the crimes prohibited by statute would be misunderstood without its assistance; all of the civil enactments would become obscure if it did not shed its light in never-failing streams upon them. Yet it cannot originate a single punishment, or create a single crime. It does not give any jurisdiction to the judge, or increase the

number or widen the extent of the subjects on which he has authority to decide. When he has a duty to perform, it gives him wisdom and strength to perform it; but the duty itself it cannot create, enlarge, diminish or destroy.

This subject is well treated of by Mr Duponceau in his Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States. In his preface, page xi, he says, "the common law in the United States is no longer the *source* of power or jurisdiction, but the *means* or instrument through which it is exercised; therefore, whatever meaning the words *common law jurisdiction* may have in England, with us they have none: in our legal phraseology they may be said to be *insensible.*" To them may be applied the language in which the common lawyer of old spoke of a title of the civil law: "in ceux parolx n'y ad pas entendment."

Again, preface, pages xiv, xv, "I contend that in this country no jurisdiction can arise," from the common law as a source of power—"while," as a means for its exercise, "every lawful jurisdiction may be exercised through its instrumentality, and by means of its proper application."

The common law would be impracticable in its application to copyrights in the United States. It might vary in every state in the union from the rest. What is the common law of New York or Pennsylvania? It is the common law of England, as it has been adopted or modified in those respective states. Each state then has or may have its own common law as a system, or as it applies to a particular subject of regulation or control. But copyrights, as recognised by the United States, must be uniform. There cannot therefore be a state common law for copyrights for the want of necessary uniformity: and if the United States cannot derive it through the states, they have it not at all. "This power," says Chancellor Kent, 2 Com. 299, "was very properly confided to congress, for the states could not separately make effectual provision for the case."

The states themselves at no time ever treated this as a common law right. Before the adoption of the federal constitution, accordingly, several of them are found to have made special provision by statute on the subject. New Hampshire, Massachusetts, Connecticut, New Jersey, Maryland and North Caro-

lina, each passed acts of assembly to secure to authors an exclusive enjoyment for a term of years. Why should they have secured a right already in full existence? They might have merely provided a penalty for an already perfect right. The periods for which an exclusive right is maintained are different in these provincial enactments. In Germany this difficulty is cured by rendering them perpetual in each department. But there is no common government in that country to which the subject can be referred.

This is a subject expressly ceded by the states to the general government. It is extinguished with regard to them in all its parts. Whatever power or control the states might have exercised is now gone, and all is vested in the United States. No common law power, then, of any kind in relation to copyrights exists. Not in the states, for they have surrendered the whole subject to the federal government. Not in the United States, for they exercise only the jurisdiction which is conferred by the constitution and the laws. Nor have they declined or omitted to fulfil the trust thus confided to them. If some powers are left unexercised (as in the case of bankruptcy), such omission cannot be asserted with regard to the protection of literary property. It is amply provided for. No assistance is needed from any other jurisdiction: no deficiency is even suggested to have been left to be supplied.

Mr Duponceau, in his treatise already cited, page 101, asserts, "that when the federal courts are sitting in and for the states, they can, it is true, derive no jurisdiction from the common law; because the people of the United States, in framing their constitution, have thought proper to restrict them within certain limits: but that, whenever, by the constitution, or the laws made in pursuance of it, jurisdiction is given to them either over the person or subject matter, they are bound to take the common law as their rule of decision, whenever other laws, national or local, are not applicable."

Judge Chase, in the case of the United States v. Worrall, 2 Dallas's Rep. 384, uses this comprehensive phrase, "in my opinion the United States as a federal government HAVE NO COMMON LAW!" "If indeed the United States can be supposed for a moment to have a common law, it must, I presume, be that

of England; and yet it is impossible to trace when or how the system was adopted or introduced."

It would be most strange if the double jurisdiction did exist. The constitution, and the statutes enacted in furtherance of its provisions, instead of providing or extending rights and remedies, would have greatly limited and restrained them: instead of doing, as they were designed to do, much benefit to the author, they have done him much positive harm. He had already, according to the theory we are opposing, rights by the common law. These rights, if they were perfect in their nature, were unlimited in their extent. The patronage of American legislation then abridges the duration of the right, if it does not curtail its enjoyment, by imposing restraints and prescribing preliminary forms. It does more, it draws a distinction between the stranger and the citizen or resident; but the distinction, if it mean any thing, is in favour of the former, and against the latter. The natural law, or common law, would be unlimited in the duration of the privilege which it would confer; and the labour and skill exhibited in the composition, would secure the right. This would be an innate privilege of the foreigner. The statute law afterwards comes and confines the security to a term of years, and makes the way to obtain it intricate, or at least perplexed! How does this consist with the language or the spirit of the eighth clause of the eighth section of the first article of the constitution? That clause ordains, that congress shall have power "to PROMOTE the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." It would not be to promote, but to retard that progress, if it possessed already a more active stimulus. There would be no occasion to secure for a limited time, if the exclusive right already existed in perpetuity.

The case of Ewer v. Coxe, 4 Washington's Circuit Court Reports 487, is broad enough to cover all that is now contended for. Judge Washington having demonstrated the necessity of the proprietor's complying with the provisions of the act of congress, in order to obtain the benefit conferred by that act, declares "if he has not that right, he can have no remedy of any kind." The right thus referred to, was one purely under the statute. But it was the only available one

that could exist; the only one that could carry with it, or be productive of *any remedy*.

In order to sustain his claim at all, an author who has not complied with the provisions of the statute, must make out these several positions:—

1. That a right and a remedy existed independently of the statute, and prior to it.

2. That the provision of redress by the statute does not take away a previous right.

We have endeavoured to show that the first of these positions is unsound, and if so, the second is altogether inapplicable.

The language of the supreme court of New York (Almy v. Harris, 5 Johnson 175; see also Scidmore v. Smith, 13 Johnson 322 and 1 Roll. Abr. 106, pl. 16), applied to a totally different matter, may be usefully quoted here. "If Harris had possessed a right at common law, to the exclusive enjoyment of this ferry, then, the statute giving a remedy in the affirmative, without a negative expressed or implied for a matter authorized by the common law, he might, notwithstanding the statute, have his remedy by action at the common law. 1 Com. Dig., Action on Statutes, C. But Harris had no exclusive right at the common law, nor any right but what he derived from the statute. Consequently, he can have no right since the statute, but those it gives; and his remedy, therefore, must be under the statute, and the penalty only can be recovered."

"But where a statute gives a right, and furnishes the remedy, that remedy must be pursued." Gedney v. The Inhabitants of Tewksbury, 3 Mass. Rep. 309. And, "when a statute creates a new right, without prescribing a remedy, the common law will furnish an adequate remedy to give effect to the statute right. But when a statute has created a new right, and has also prescribed a remedy for the enjoyment of the right, he who claims the right must pursue the statute remedy." Smith v. Dean, 5 Mass. Rep. 515.

The same principles will make it necessary, in order to reach the rights which the statute creates, to pursue the means which it points out. Judge Washington, in Ewer v. Coxe, 4 Wash C. C. Rep. 491. already cited. says, "that the author

must perform all that is pointed out before he shall be entitled to the benefit of the act. It seems to me," says he, "that the act will admit of no other construction."

The case of Beckford v. Hood, 7 T. R. 620, has been relied on to show that the directions of the English statute are not necessary preliminaries to the establishment of the right. The judges of the king's bench were construing a very different statute from ours. The second section of the act of 8 Anne, c. 19, 12 Statutes at Large 82, recites, that "whereas many persons may, through ignorance, offend against this act, unless some provision be made whereby the property in every such book, &c. may be ascertained, &c." and then enacts, that "nothing in this act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books without such consent as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of Stationers Hall, &c.

The corresponding clause of the act of congress of April 29, 1802 runs thus: "that every person, &c. before he shall be entitled to the benefit of the act, &c. shall, in addition to the requisites, &c." The preliminary in the English statute is connected directly with the penalty. In ours, it is directly associated with the whole benefit of the act. The decision in Beckford v. Hood cannot affect the present case, even if it be sound. Of the soundness of it there may be much doubt, when we find Lord Hardwicke deciding, in Blackwell v. Harper, 2 Atk. 95, that "upon the act of 8 Anne, c. 19, the clause of registering with the Stationers Company is relative to the penalty, and the property cannot vest without such entry." A farther view is taken by Judge Hopkinson of this decision in Beckford v. Hood, which is respectfully submitted as a conclusive reply. It will be found in his printed opinion. (*a*)

Let us look at the statutes themselves. The question here between us seems to be whether the acts of congress merely *provide a remedy*, or also *constitute a right*.

The act of 31st of May 1790 would have commenced with

(*a*) See Appendix, No. II.

its second section, if it had merely intended to suggest redress for the infringement of an existing right. This second section, however, is only a corollary or incident to the first, which provides, in compliance with what the constitution had authorized, secu ity to authors which they did not in any shape enjoy before. There is nothing declaratory about it.

"*From and after* the passing of this act the author, &c. *shall have* the sole *right*, &c. &c." The right is certainly prospective, and it is (we say) conditional. The right is to arise at all events subsequently to the passage of the act, and it is to commence "from the recording the title, &c. in the clerk's office as is hereinafter directed."

It would seem to be quite unnecessary thus gravely to confer in prospect a privilege already enjoyed, and to trammel it with conditions, if it was already unconditional. This is certainly no restraining statute.

An argument has already been used, and it will not be formally repeated, that the ostensible or professed *encouragement* of learning, by *securing*, &c. *during* the *times* mentioned, would be a mere delusion: for the encouragement had been more liberal—the security not less perfect—and the right more comprehensive, because of unlimited extent, if they respectively had *any* anterior existence whatever. It is no less striking, that congress, who are supposed to be declaring the common law, and merely providing a precise penalty for the infraction of a right under it, could not, by any possible exercise of their power or authority, come up to the supposed common law right; for the paramount authority of the constitution restrains the exercise of any encouragement to a limited time.

The act proceeds to mark out the preparatory step towards penalty or prohibition, viz. the *legal acquisition* of a copyright. (Section 1.) And how is the copyright to be *legally acquired?* Why only by following the directions of the statute, i. e. depositing the title in the clerk's office, publishing the record, and delivering a copy within six months to the secretary of state, to be preserved in his office. (Section 3.)

Judge Washington was inclined to think that some of these provisions were merely necessary to enable the author to sue for the forfeitures provided by the second section.

But that would be quite an empty satisfaction. The copies forfeited by the invading party are to be destroyed; and the

penalty of fifty cents for every sheet in his possession, belongs one half to the United States. The author is not much the better for this provision. He might have reserved all the damages for himself, independently of the act, if the right existed previously.

It is not necessary to rely upon the construction of this act alone, if there be any doubt with regard to the true interpretation of it. The supplementary act, passed April 29, 1802, is free from all difficulty. It is on this that Judge Washington relies.

This last act provides, section 1, that the author, "before he shall be entitled to the benefit, &c. shall," in addition to the requisites enjoined in the third and fourth sections of said act, &c. "give information, by causing the copy of the record, &c. to be inserted at full length in the title page, &c."

It thus makes those clauses which had before been of doubtful name, *requisites*. It requires him to perform them, not as preliminary to forfeiture or penalty, which are only particular provisions of parts of the act, but as preliminary to the benefit of the act itself. He, therefore, in terms, is denied its advantages, unless he perform the conditions precedent. These, agreeably to a well known rule, are to be construed strictly, and the party who omits to bring himself within them can claim no right whatever. The statute becomes a unit; all its benefits are yielded or withheld, exactly as all its requisites have been fulfilled or disregarded.

Requisite is aptly defined by the American lexicographer, Noah Webster, to be "so needful that it cannot be dispensed with; something indispensable." An author must show that he has complied with these affirmative requisitions, or they will not be presumed for him.

There are familiar analogies which will fully sustain this position. Take the statute which regulates distresses for rent. Certain provisions are made which justify a landlord for acts which would otherwise amount to a trespass. But he must show that he has performed them strictly, or, as the law at first stood in England, and does still in Pennsylvania, he is a trespasser *ab initio;* and the statute of George II. only so far alters the rule, as to leave the party to his remedy by action on the

case for the recovery of the actual damages that may have been sustained.

If notice be required by statute, as, for example, preparatory to a suit against a magistrate for misconduct in office, not only is it never presumed, but nothing can supply its proof; not even knowledge of the design to sue, which might be substantially the same thing. In such case, *knowledge is not notice.*

There is nothing against our construction in the principle which requires a strict interpretation of certain statutes. If the act be penal, we are not endeavouring to enforce the penalty. There is nothing penal as to the author claiming the copyright. All the penalties are against other persons. It is to be construed strictly when it is to be enforced against *them.* He claims the benefit of his copyright, which is a grant to be obtained only on conditions precedent and well defined. He attempts to enforce with rigour, if not the penal forfeitures, at least the penal prohibitions of the law against the defendant, whom he alleges to be a wrong doer. Against the defendant, thus, without (if it be without) bringing himself under the provisions of the law, the alleged proprietor denounces awful consequences. The defendant asks nothing—wants nothing, but to be let alone until it can be shown that he has violated the rights of another.

Where is the difference between this act and the act respecting patents, as regards the right of the alleged owner? This court has said, that if a defendant sued for the infringement of a patent right, "shows that the patentee has failed in any of these prerequisites on which the authority to issue the patent is made to depend, his defence is complete. He is entitled to the verdict of the jury and the judgment of the court." Grant v. Raymond, 6 Peters 220.

3. There will be little difficulty in showing that the provisions of the acts of congress have not been complied with.

The requisites are:

1st. The deposit of a printed copy of the title in the clerk's office of the district court where the author or proprietor resides.

2d. Within two months from the date thereof, the publishing of a copy of the record in one or more newspapers printed in the United States, for four weeks.

3d. Within six months, the delivery, &c. to the secretary of state of a copy to be preserved in his office.

With regard to the first volume, the bill is defective in not stating either of the two last requisites. The complainants are *informed by M. Carey*, and *believe* that all things which are requisite and necessary to be done, &c. have been done! !

An inference or conclusion even of the party, would be a sorry substitute for the allegation and proof of the facts themselves. The court must have an oppportunity to judge whether *all things* were done, &c.; and that they can have only when the things which were done are exhibited and proved. But here is double distilled inference. The parties are *informed* of Matthew Carey's *conjecture*; and this is presented to the court as a substitute for proof; while H. C. Carey proves that Matthew Carey knew nothing about it, for all was left to *him*. It is extraordinary if Mr Carey really possessed any information on this subject, that he was not produced as a witness.

Upon the complainants' own allegations, their case must fail. But the proof is scarcely less defective than the allegations of the bill. Henry C. Carey, the clerk of his father in 1816, states that they were in the habit of advertising, and from the *course of business* he does not doubt it was advertised, but he *has no recollection of it*. He has no recollection at all of a deposit of a copy in the office of the secretary of state. But he says, that the most probable way in which it was sent, was by Mr Wheaton. In other words, that it was not sent by himself; and, therefore, as to any proof from him, that it was not sent at all.

Mr Brent states, that the eighty copies of the volume of Wheaton's Reports, containing the decisions for February Term 1817, were delivered to the department of state on or before the 4th day of November 1817. This refers, of course, to the second volume which contains the decisions of that term, and not the first, which is for the previous year. Subsequent volumes had been delivered in the same manner; all of them were received under the acts of congress, giving a salary to the reporter. He adds, that there has always been, according to his recollection, one or more complete sets of said reports, from the time of their publication, in the said department of state. But he is unable to recollect, or state more

particularly *when* the same were first placed in said department, or for *what purpose.*

Both of these particulars, it is conceived, must be made out. The delivery must be within six months. The loose declaration that, according to his recollection, there has always been one or more sets, &c. *from the time of publication,* if it could have any force by itself, is done away by his acknowledged inability to recollect when they were first placed there. The object of the receipt of them too, is directly the reverse of that prescribed by the copyright law; for, instead of being delivered *to be preserved in the office,* &c., they were, if delivered at all, merely a part of a general library, intended to be lent out and used. If delivered to be preserved, the presumption is, that the particular copy so left would be found. It will scarcely be contended that the second edition of the first volume can cure the defects of the first. It can have no copyright existence by itself.

With regard to the subsequent volumes, the bill is scarcely less defective. The declaration of Robert Donaldson is vague and unsatisfactory. It could not be otherwise. He knew nothing of the subject. The result of the inquiries at the department of state, is evasively set forth; and were it otherwise, he must state the fact, and not the inquiry.

The bill proceeds to insist, that the complainants would still be entitled to the benefits of the acts of congress, although they should be unable to prove that a copy was delivered, &c. We say, that such proof is a necessary preliminary.

The proof, with regard to these subsequent volumes, is equally defective. Of the second volume, there is no proof of publication. And of none of the volumes is there either allegation or proof of deposit, agreeably to the provisions of the law.

The fourth volume wants publication. It began August 28th, and ended September 17th instead of 25th.

The seventh had but two publications in July, four in August, and one in September.

The eighth had one publication in October, five in November, and two in December.

Of the ninth there is no evidence of publication at all.

The tenth, eleventh and twelfth are all defective in publication.

It is not necessary to dwell upon the facility with which proof of delivery might have been preserved and exhibited if it had been made. The requisites of the law must be shown. But the certificate of Mr Van Buren, with regard to the second edition of the first volume, is a specimen of what might have been, and would have been produced with regard to the whole, if the deposit had in fact been made.

In the absence of all right on the part of the complainants, not much difficulty is apprehended from any supposed possession or enjoyment, by colour of privilege. Judge Washington, in delivering his opinion in Ewer v. Coxe, disposes of this question to our hand. 4 Wash. C. C. Rep. 489. "I hold it to be beyond controversy," says he, "that if the plaintiff has no copyright in the work of which he claims to be the owner, a court of equity will not grant him an injunction. This was formerly the doctrine of the English court of chancery, and still is, as I conceive, notwithstanding Lord Eldon has, in some instances, granted an injunction and continued it to the hearing, under circumstances which rendered the title doubtful, if the plaintiff had possession *under a colour of title*. But surely if he has no title at all, or such a one as would enable him to recover at law, even that judge would, I presume, refuse an injunction."

The authorities cited by Judge Washington support the principle which he maintains.

Against whom is this mere naked possession claimed? Not the defendant; for during the period when it has existed he was only one of the mass of individuals who had not any particular concern in disturbing the complainants' colourable claims. It is therefore against the public, who cannot thus be baffled of their rights.

It is, however, a most extraordinary case, that would justify a perpetual injunction without a trial at law. This is a proceeding which turns aside from the regular and proper mode of ascertaining title, and asks that the existence of it shall be definitively rested upon mere colourable claims. The complainants do not choose to bring their case to the proper test: but assuming as *conclusive*, what at the utmost is only prima facie evidence in their favour, they propose to hang up for ever, in a state of presumption and doubt, that which is susceptible of a just and satisfactory settlement. All that the defendants

ask, in the dismission of the bill, is, that their rights may not be prejudged.

Mr Sergeant, for the defendants.

The claim now asserted by the appellants, is to a perpetual right in Wheaton's Reports, in Mr Wheaton and his representatives and assigns. Such a right is necessarily exclusive. It goes beyond the right claimed to be secured under the copyright acts of congress. Such a claim should be clearly established. It is asserted for the first time in a court of the United States. It has no precedent in the proceedings of the courts of England; for since the decision in that country, that the statute of Anne took away the alleged right of an author at common law, there can be found no precedent in that country, to sustain such a claim.

The Condensed Reports, so far as it is now material to examine them, are made up of statements, which are to be found on the records, and of the opinions of the court. Mr Wheaton's notes are not interfered with—nor are his reports of the arguments of counsel. These, it might be admitted, are his own; if he can have a property in any of the matters contained in the volumes published as a public officer.

Mr Wheaton's Reports are made up as an officer of the court. The court appointed him under the authority of a law of the United States, and furnished him the materials for the volumes; not for his own sake, but for the benefit and use of the public: not for his own exclusive property, but for the free and unrestrained use of the citizens of the United States. In relation to the work, he was not an author, but as an officer, as a public agent, selected, authorised and paid for making up the reports of the decisions of the court.

In the whole composition, under these views of the facts of the case, not a word in the reports belongs to him. It could not be the intention of the court to give him a perpetual right to the opinions delivered by them. No such purpose could have been entertained by congress, when the appointment of a reporter was directed. The objects of the law, and of the court, were to authorise, enforce and secure the publication of the proceedings and decisions of the court, for public information. Any argument, or course of argument tending to

a different conclusion, must be wrong; because contrary to the design of his appointment. It is in derogation of common right.

Let us see how the claim of the complainants is made out.

1. The question whether the power to regulate copyrights under the constitution is exclusive, can never arise, until some state shall pass a law interfering with its exercise by congress. 3 Story's Com. 50. Until then, it must be a theoretical question. The law of New York, which was intended to secure exclusive rights in the navigation of the waters of that state by steam, was by this court decided to be unconstitutional. The court decided the case on other grounds, it is true, but still so decided.

Up to the present moment, no state has asserted a right to interfere with the power of congress, under the constitution, to regulate copyright. There is no judicial decision which asserts or supposes any such right. There is not a trace, sign or symptom of any such right existing in the legislation, or judicial proceedings of any state. There is, therefore, no collision; no case for judgment. But the contrary is evident.

It is not necessary to inquire whether states *have* the power, if they have not chosen to exercise or claim it. It is clear that there was no such thing in any of the states prior to the constitution, but by the invitation of congress, under the confederation. Fed. No. 43; 3 Story's Com. 49. Congress found the whole case unprovided for; and the laws made by some of the states, at their instance, and which have been referred to by the counsel for the appellants, ceased when the constitution was adopted.

But supposing that a concurrent power to regulate and secure copyright existed, in the states and the United States; a supposition of exceeding difficulty and doubt; and that the states may act notwithstanding the exercise of the power by congress; it is for the states to choose whether they will do so or not. They have not so chosen, they leave it to congress. But there are many reasons for considering this power exclusive, as well as reasons which clearly show it ought to be exclusive.

1. It was originally taken up by congress as matter properly belonging to their cognizance. Early in the progress of the

government the first law was passed; which was followed by other legislation, thus establishing the present regulations. This power did not exist in congress under the confederation. None of the provisions in that compact applied to it; and it now rests upon the article in the constitution which gives congress the power to "promote the progress of science and the useful arts." The whole ground is admitted to have been vacant, on the establishment of the present government. It was a new power. Fed. No. 43; 3 Story's Com. 48; Rawle on the Const. ch. 9, p. 105, 106; 2 Kent's Com. 306, &c.

2. The power could only be properly, beneficially and effectually exercised by congress. By vesting the power in the national legislature, the system became uniform and certain. Authors, but for this, would have been subjected to different provisions and conditions in every state; thus materially affecting the value of all their rights. And the community throughout the whole nation were thus, after a certain interval, entitled to the benefits of the writings or compositions of those who availed themselves of the laws, passed under the constitutional provisions. 3 Story's Com. 48, 49.

3. There is an absolute incompatibility between the existence of the power in the United States, and in the states.

It has been repeatedly said that the constitution has not occupied the whole ground. That it has provided for the author, and not for the public. But the true state of the case is directly the reverse of this. It has provided for the case of the author, only as instrumental to the provision for the public. The clause in the constitution gives congress the power, not to secure a copyright to the author; but to "*protect the progress of science and the useful arts*, by securing for *limited times* to authors, &c. the exclusive right to their respective writings, &c." It is to be for a *limited time*, no longer. 3 Story's Com. 49.

4. The state of the law in England was known here by the adjudications in the courts of that country. These adjudications stood in this way. 1. That there was a common law right before the statute of Anne. 2. That there was no common law right after that statute. According to those decisions, the effect of legislation was to take away the common law right. Where the power of legislation over the subject was placed there was the power over the whole matter.

5. The same word "secure" is applied in the article in the constitution to inventions, as well as to the works of authors.

In inventions, it is admitted, there was no common law property. The use of the word "secure" cannot, therefore, presuppose an existing right. It would have the same effect, and be equally applicable to both. No benefit can, therefore, be derived from the use of the term; however ingenious the argument which invokes it in aid of the pretensions of the complainants. Cited, Act of 41 Geo. III.; Maugham 36, 37.

6. The uniform construction, and the practice under it, have been such as is contended for by the defendants.

It is true, there was an omission in the laws to give full power to the courts of the United States, in cases of copyrights. But the omission was to no great extent. There was no provision for jurisdiction, when the parties to a suit of which copyright was the subject, were citizens of the same state. Binns v. Woodruff, 4 Wash. C. C. Rep. 48. But that omission was supplied by the act of 1819. 3 Story's U. S. Laws 1719.

7. In what state, supposing an author to have a right at common law, is the right to exist, and be protected. If there is a right of property, it must be governed by, and have the benefit of all the rules which affect such property. It accompanies the owner every where. It is not his because he is a citizen of the United States. It derives no additional security from such citizenship. A stranger, who is an author—a foreigner has the same common law right of property; and no foreign book can be printed here. Such has not been the understanding in England, from which the principles to sustain the right are derived. No common law right extended to Ireland before the union. There, at all times, before the union, the works of authors, however secured under the statute of Anne, in England, were printed and published. If a common law right existed, or was supposed to exist, we should have found, in the proceedings of the Irish courts, its establishment by judicial decisions.

But supposing it were otherwise, and that a right at common law does exist; upon the laws of what state do the complainants rely? Upon the law of Pennsylvania? In the circuit court, the right was claimed on the common law of the nation. In this court, it is asserted to rest upon the common

law of a state. Below, no intimation of such a thing was given. If any such right, under the common law of Pennsylvania, exists, we of Pennsylvania do not know it. Strangers have discovered it, and claim the benefit of it, for the first time. Not a trace of its existence can be found in the whole history of that state. No authority from any of the laws, or the decisions of the courts, has been vouched. It is denied that it exists.

It is, then, assumed, without hesitation, that the right of action, whatever it is, which an author has for an infringement of his copyright, arises from the constitution and laws of the United States. The constitution gives congress the power "to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Art. 1, sect. 8, ch. 8. Until *secured* by congress, he could have no right under the constitution. When secured, it must be to such extent, and upon such terms as congress may enact.

Some argument has been presented upon the word "securing," as admitting a pre-existing right. But there is no force in the suggestion. There must be a pre-existing state of things, out of which a right to apply to be secured arises. That right is brought into existence by the constitutional provision. It had no existence as a right incident to the fact of the author being a member of the community of the nation, until the constitutional provision. By the agreement of those who made the constitution, the right was brought into existence; and it was to be secured. The language, therefore, is accurate. It has already been observed, that the term "securing" is applied equally to *inventions;* yet no common law right to inventions has been asserted.

The federal judiciary, at all events, can have no cognizance of claims to copyright, but under the laws of the United States, made in pursuance of the constitution; and to the extent such laws may authorize them to go.

Thus understood, what is the right of an author? There is a difference between a *patent* and a *copyright.* A patent, in due form, is prima facie evidence of the right of the inventor. It is, itself, prima facie proof of all the prior acts required by the laws. It rests for its support upon the invention. But

invention, without a patent, is nothing. A man, without a patent, could not ask the aid of the court to protect his claims. The patent is, therefore, evidence, prima facie, of right.

A copyright is quite a different thing. Its existence, as a right, depends upon doing certain acts. The doing of these is the foundation of the right. Their being done, is the only *evidence* of the right. If they are not done, no right, or even claim exists. These acts, therefore, as to copyright, are as a patent in the case of an invention. There is nothing that performs the office of a patent. The whole acts together establish the right.

In the case of an invention, the patent being a prima facie case of right, in the first instance, where the right of the inventor is disputed, it is sufficient to prove the patent, at law or in equity.

In the case of a copyright, the title is made out prima facie, at law and in equity; by stating and proving the acts which, by the provisions of the law, constitute the copyright.

This distinction is a most material one, and to be always kept in mind. It goes to the root of the whole case. If any thing has been omitted or neglected; if any of the requirements of the law, the performance of which are conditions upon which the right rests, and by which the right would be protected by the law, have been neglected; there is no title at all; no title in existence. Such a case is the same with that of an inventor coming into court without a patent.

The court will not grant him an injunction. Ewer v. Coxe, 4 Wash. C. C. R. 487. There is nothing in such a case on which to engraft the doctrine of possession. It is only when a prima facie title exists, one made out by showing a compliance with the law, that the doctrine of possession can be applied. Ewer v. Coxe, 4 Wash. C. C. R. 488.

This brings us to the first head of inquiry, which separates itself into two branches.

1. What are the requisites to a copyright under the laws of congress?

2. Have these requisites been complied with?

1. Upon the first question we have the light of a judicial decision, and there is no decision to the contrary. It is that of a judge of the highest and the most regarded judicial talents;

one whose opinions have always received the utmost respect. In Ewer v. Coxe, 4 Wash. C. C. R. 487, Judge Washington held, that to entitle the author of a book to a copyright, he must deposit a printed copy of the title of such book in the clerk's office; publish a copy of the record of his title within the period, and for the length of time prescribed by the third section of the act of congress of 31st of May 1790; and deposit a copy of the book in the secretary of state's office, within six months after its publication. The requisites of the third and fourth sections of the act of congress of 1790, relative to copyrights, are not merely directory; but their performance is essential to vesting a title to the copyright secured by law. The act of congress of 29 April 1802, declares, that, in addition to the requisites enjoined in the third and fourth sections of the act of 1790, and before the person claiming a copyright shall be entitled to the benefits of the same act, he shall perform all the new requisites; and that he must perform the whole before he shall be entitled to the benefits of the act. "It seems to me," says the judge, "that the act will admit of no other construction."

The argument upon the two acts taken together is plain and convincing. Act of 1790, 1 Story's Laws of United States 94; Act of 1802, 2 Story's Laws of United States 866. The question, be it remembered, is, what are the requisites under the act of 1802.

1. When these acts were passed, the whole subject of copyrights was open for legislation. The object of congress was to carry into effect the provisions of the constitution, by establishing a mode of obtaining a copyright. The provisions of the laws have no other view.

It is material and reasonable, then, to suppose, that whatever was directed to be done was a *requirement*. The acts to be performed, were to secure for a limited time to an author, the benefit of his writings; and these acts were directed for that purpose. It is impossible to distinguish, so that one of the acts shall be decreed material, and another not so. The whole, and each of the acts are pointed out in the law, and the most natural course is to deem them all material. They do all, in effect, constitute the conditions of the title; they constitute the title itself.

2. Upon the words of the act it seems impossible to raise a doubt. They are plain, clear, and require no explanation. The acts they require, are of easy performance; the evidence that they have been performed, can always be obtained and preserved. The reason of requiring these acts is not here in question.

It is probably true, that when the act of 1790 was passed, congress had before them the statute of Anne, and the decisions of the English courts upon that statute, and on all the litigated questions of literary property, and of copyright. This is equally true of the act of 1802; and this must be considered in reading that act.

But the reason of the requirement of the law is obvious. The author "shall deliver a copy to the secretary of state, to be preserved in his office."

The copy to be delivered is not to constitute a part of the library of the secretary of state. The books deposited for copyright, never do form a part of the library of the department of state. They are, it is understood, always marked, "deposited for copyright," with the date of the deposit. The books so deposited are not lent out, or ought not to be. They are "to be preserved in the office" of the secretary of state. They are not delivered for the sake of the officer, nor are they like the copies delivered to the stationers' company, under the act of Anne.

Why does the law require a copy to be deposited in the office of the secretary of state? It is a material requirement. Why, it is asked, were models and drawings to be deposited in the patent office, a part of the department of state? That is a kindred subject, and the reason is the same in one case as in the other.

If a model, or a drawing of a machine or invention is required to be deposited in the patent office, the reasons and the objects of the requirement are, that the public may know what the invention is; and that, after the limited period shall have expired, they may have the use of it, according to the purpose of the provision in the constitution. A book or writing is required to be deposited for the same reason. The matter claimed as original is there to be preserved, in order that the extent and nature of the claim for the limited period may be known. The deposit of the title in the clerk's office, the pub-

lication of the record in the newspapers, give no information of the contents of the work; but the deposit of it in the secretary's office does this: and as it is "to be preserved" there at all times, there the extent of the author's claims can be always known.

The law enjoins on the secretary of state obligations which are consistent with those views of its purposes. It is made his duty to preserve the books deposited in his office. He is thus the trustee of the author and of the public. The court will not suppose this duty is ever neglected. It will always presume the injunctions of the law are complied with.

As to the author, he has an easy mode of securing the evidence of his compliance with the law. To his rights, the preservation of the book deposited, is not essential. He has done all that is required of him, by depositing the copy of his work: and the certificate of the secretary of state, which the secretary has power to give, will be evidence of the deposite.

An examination of the provisions of the act of 1802, must result in the conviction that the construction contended for by the defendants is the true one. The act must be interpreted, not altered. It must be read in its own words, and according to the common meaning and use of the terms in which it is expressed. The first and second section of the act are those upon which the construction is to be given; and no better language for the clear interpretation of them can be used than those used by Judge Washington, in Ewer v. Coxe.

It is of no importance to the case, whether, by the law of 1790, the acts to be done by an author were conditional or directory. They were enjoined—they were "requisites." The act of 1802 has so declared them, and without this they were clearly so. This cannot be reasonably denied.

The construction conceded by Judge Washington, in Ewer v. Coxe, of the provisions of the act of 1790, is not satisfactory. Having ascertained to his complete satisfaction, that the act of 1802 left no room to doubt that the acts imposed on an author, were conditions essential to his copyright; that venerable and learned judge did not consider it necessary to examine the provisions of the law of 1790, with the care and scrutiny he would have done, had the case rested on that law only.

The requirements of the law of 1790 are made of the party himself. It is in his power to perform them all. They are

all, and each of them, parts of a system having reference to the author and publisher. The act of depositing a copy in the office of the secretary of state, is one of the number of acts by which he evinces his *intention* to secure a copyright, and by which he *executes* his intention. Less than the whole does not suffice to prove the intention. Less than the whole is not a copyright.

The publication in the newspapers is on the same footing. It will surely be admitted that was material. Yet they are both of the same character. There was no necessity for either, if not for both. Unless both were to be performed, both were nugatory; and the whole provisions of the law might have been a dead letter.

The law of 1802 places the question of construction of the act of 1790 out of doubt or controversy. It declares the acts stated in the law of 1790 to be requirements. He shall, in addition to the "requisites" "enjoined" in the third and fourth sections of the act of 1790, do certain things. Every word of the law must have effect. Each section contains one requisite, and no more; neither, therefore, can be rejected. All must have their full force.

The second section is equally clear. It helps to construe the other.

These, it will be seen are words of enactment, not of *recital*. They make the law; they do not declare or expound it. Whatever the law may have been before 1802, it is now established. The decision in Ewer v. Coxe, in establishing the construction of the act of 1802, establishes that of both statutes.

Under these views of the law, founded on the fair and sound construction of their provisions, and supported by the decision in Ewer v. Coxe; copyright is the union of these acts, the "requirements" of the laws by an author. It is nomen collectivum, signifying all that confers and constitutes the right.

2. Such being the law, how stand the facts of the case? And now it must be conceded that the proof of title, and compliance with the law, lies upon the complainant. He must state the facts distinctly in the bill, and he must *prove* them as stated. Most clearly this is his duty, when he asks the extraordinary aid of a court of equity.

Nor can it be deemed unreasonable to require this. The proof of his title to copyright is of such a nature that it may easily be preserved. It may consist of an official certificate of the deposite of a copy of the work—of newspapers to prove the required publication.

There is a want of such allegations in the bill, as well as of such proof.

Mr Sergeant declined going into an examination of the bill and evidence in support of the positions he assumed; considering that they had been fully sustained by the argument of Mr Ingersoll. He also referred, in support of these positions, to the opinion of the learned judge in the circuit court, by whom the case was decided.(*a*)

Upon the point made by the counsel for the appellants, that the delivery of the eighty copies of the reports under the reporter's act, was a compliance with the requisite of copyright acts, of the deposite of a copy in the secretary of state's office; he also referred to the decision of Judge Hopkinson.

The case, as exhibited on the record, and by the examination of it which has been submitted to the court, is one which has no claim to the relief sought by the complainants. Its principal features are repeated, to connect with them other matters deserving the consideration of the court.

Mr Wheaton undertook the preparation and publication of the reports of the decisions of the court, under the appointment of the court. He furnished nothing original from his own mind. All the contents of the reports were the fruits of the minds of others; supplied for the public use; at the public expense; or at the expense of others. There is not a thought of Mr Wheaton's from the beginning to the end of the work. It was intended for the public, for their use and benefit; and should therefore be made as public as possible.

In process of time, after the publication of the first volume of his reports, Mr Wheaton became a public officer; with a salary for his labour as reporter, and obliged to perform the duties of the office. This provision for the reports, it has been said, in the course of the argument for the complainants, was obtained at the earnest solicitation of Mr Wheaton. It there-

(*a*) Appendix, No. II.

fore became a contract on his part, for the sum allowed by the law, to prepare and publish the reports. See act of 1823. He became, like the clerk of the house of representatives, keeping the journals.

The object of his appointment, the plain purpose of the law, was to preserve a record of the proceedings and decisions of the court; the highest tribunal in the nation; and to give them circulation. If Mr Wheaton could have a copyright, this object might be entirely defeated—his book might be a sealed book.

Out of this public work it becomes necessary to compile something less bulky and expensive. The usefulness of such a publication is admitted by all but those interested to deny it. Mr Peters undertakes to prepare it, and he has completed the work. He announced his intention to do this publicly; and fully explained his plan. No efforts were made to stay this proceeding until invited by him; and after he had completed the third volume of his work. If the further circulation of his book is stopped, it will be a public injury. Such a result will limit the knowledge of the law of the land, as determined and established by this court, to but a small portion of the community; while all are interested in knowing it.

But here a question arises, whether books of reports can be copyrighted in England or in the United States.

There are no cases decided in which the principle is established, that reports of the decisions of courts of law are the subjects of copyright. The case of Streater v. Roper, 4 Bac. Abr. Prerogative; Maugham 101, note; was reversed in parliament. By that decision the prerogative right, the right of the patentee, was established. No right, as author, was sustained by this case; but the contrary. It is true, that Maugham says the prerogative claim is ridiculous; but it rests on a decision that it is the ancient law. In the case of Butterworth v. Robinson, 5 Ves. 509, it does not appear how the right was derived.

By the decisions of the house of lords, no such right is maintained. No copyright, in any one author, is supported by those decisions. No one could report but by the authority of the chancellor; and this authority was exclusive; it prohibited all others from interfering. Gurney v. Longman, 13 Ves. 493.

The whole of this subject will be found to be examined in the compilations of Jeremy, Maugham and Godson. The law is not established, at least it has not been so declared, that reports can be private property. Essentially, their contents are public property. The knowledge of the decisions of courts should not be confined. It is consistent with the views of this court, that copies of their opinions should be multiplied to any extent, and in any form required. Publicity is the very thing required.

4. The reporter is a public officer, and his duty, by law, is, to publish. He has no liberty to keep back the matter which he collects and prepares, in the performance of his official duties. The act of 1817, 3 Story's Laws 1639, regards him as a public officer. So by the subsequent acts, which will be found in Story's Laws 1803, 1913, 2046. The court, in 3 Peters 397, at January term 1830, decided that the reporter was the proper officer to give copies of the opinions of the court, when required. Could he refuse such copies? Could he refuse to give a copy of a report of a case, when asked for it; on the ground that it was his property, and only to be used by his consent, and for his benefit. The whole purpose of the reporter's act would be defeated, could this be done. That act makes him the officer to give publicity to the proceedings of the court; but, upon this view of the matter, it has placed him in a situation to get possession of the official actions of the court; it has given access to the records of the court, and has placed him in a situation by which he has obtained all the materials to accomplish the plain and obvious intention of the law, for his private advantage, and that he may defeat and set at naught that intention. Such cannot be the law. This court will never sanction such pretensions.

The purpose of the appellants is to subject the defendants to all the evils of a violation of the copyright acts, by a proceeding which deprives them of the benefits of a trial by jury. Such a course will not receive the favour of this court. The facts upon which the rights of the complainants must rest, whatever may be the construction of the acts of congress, are not made out. All the essential facts to sustain their claims are denied; and certainly, it will be admitted, the proof offered to sustain them by the complainants, is imperfect. Will the court, then, give its aid in such a case? Will they reverse the

decision of the circuit court, and order a perpetual injunction. Will they not say to the complainants, If you have rights, go into a court of law and establish them?

Mr Webster, in reply.

There was at one period no regular series of reports of the decisions of this court. Mr Cranch's reports had been published as far as the sixth volume; the rest of the matter, which afterwards formed the remaining volumes, was in manuscript. In this state of things, Mr Wheaton proposed a regular annual publication of the decisions, with good type, and to be neatly printed. It was found necessary that there should be some patronage from the legislature, there being so few persons who would purchase the reports. Mr Wheaton applied to congress, personally solicited its aid, and made a case which prevailed. Congress passed a temporary law, which was renewed again and again. The successor of Mr Wheaton has had the full benefit of the grant obtained by the personal exertions of Mr Wheaton.

If the work of the appellee be an interference with the rights of the appellants, it is not a heedless one; it may not be an intentional interference, but the acts which constitute it are intentional. The defendant was well advised of the injury which the appellants foresaw. This is fully proved by the evidence. The publication of the defendant has materially injured the appellants. Many volumes of Wheaton's Reports were on hand, unsold, at the time of the publication of the third volume of Condensed Reports.

The intention of the defendant was not to make an abridgement, but to make a substitute for the whole of the appellant's work. The reports of the appellant were the result of the joint action of congress and the reporter; they set the price. If congress had thought that the people should have them cheaper, they would have lowered the price. The defendant should not have run a risk in accommodating the public; they could judge for themselves.

The question before the court is one for the most enlarged and liberal consideration. Cases which are not in form, but are in substance an infringement of the author's rights, are to

be viewed, as respects the author, liberally. This spirit pervades all the adjudged cases.

Has there been an indefensible use of the appellant's labours? In the Condensed Reports there is the same matter as in the reports of the appellant, under the same names. Is this an abridgement? An abridgement fairly done, is itself authorship, requires mind; and is not an infringement, no more than another work on the same subject. In the English courts there are frequently more reports than one of the same cases. These reports are distinct works. Abridgements are the efforts of different minds. The Condensed Reports have none of the features of an abridgement, and the work is made up of the same cases, and no more than is contained in Wheaton's Reports.

The attention of the court is called to certain facts. The laws of congress relating to the reporter's office do not bear on the question of copyright. There is no intimation in the statute of such an interference, or that the sum allowed the reporter is in lieu of copyright. The right in the reporter to fix the price of the volumes, recognizes a right to exclude others from publishing. He receives one thousand dollars, and gives eighty copies to the United States, of the value of four hundred dollars. Would he give up the copyright for this sum; this modicum? The law was intended to secure to him the rights he possessed, and to add to them also.

Before the statute of Anne, the copyright of authors was acknowledged. In 1769, it underwent investigation in the courts. The statute of Anne was passed 1711. Pennsylvania was settled in 1682. The common law was carried to Pennsylvania on its settlement; and the statute of Anne did not change or affect it. The copyright of an author existed in the colonies, and exists in the United States; and particularly in Pennsylvania.

It has been said by the counsel for the defendants, that there is no legislation in the state of Pennsylvania, or judgment of her courts recognizing the common law right. Before the revolution there were few books made; and there are no reports of the decisions of the courts anterior to that event. The common law is a fountain of remedy, perennial and perpetual. By

its principles protecting rights when they are infringed, and its principles existing, although not called into action.

The import of the act of congress of 1790 is, that before its enactment, there were legal rights of authorship existing; it provides for existing property, not for property created by the statute. There is nothing for its provisions to stand upon, but the common law. That law is not one of grant or bounty; it recognizes existing rights, which it secures. The aim of the statute was to benefit authors, and thereby the public.

The right of an author to the production of his mind is acknowledged every where. It is a prevailing feeling, and none can doubt that a man's book is his book—is his property. It may be true that it is property which requires extraordinary legislative protection, and also limitation. Be it so.

But the appellants are entitled to protection under the statute. It is a clear case. All the statutes should be taken together. The decision of Judge Washington in Ewer v. Coxe, was not appealed from; and the question is for the first time before this court.

Is the deposite of the copy in the office of the secretary of state a condition precedent or subsequent? There is no question but that it is the latter. There is no need of the deposite being made until six months after publication. From and after the recording of the title, the right is secured, and the author may immediately bring his action for an infringement. Does this case stand differently from what it would if the action had been brought within six months after recording the title page? Ewer v. Coxe, says the book must be deposited, before the right arises; the statute says differently.

By the act of 1790 there were certain requisites, not pre-requisites, enjoined on an author. Does the law of 1802 make the requisites of the act of 1790 pre-requisites? There are conclusive reasons against this. It was the intention of the law to add to, but not to change the character of the law of 1790. If this was otherwise, there was a direct repeal of the second section of that law, by which an action is given upon filing the title page in the clerk's office.

The act of 1802 is in addition to the first act, but not a repeal of it. This is the hinge of this case. The construction

contended for will repeal the second section of the act of 1790, and will create a forfeiture.

What reason is there to doubt that the copies were deposited as required by the law? It is the ordinary course of trade to deliver them. Is it an unfair construction to suppose that the one copy required by the laws to be delivered, is included in the eighty copies delivered as reporter? Is there not a special provision in the case of the reporter, that he shall deliver eighty copies, while others deliver one copy. The same term of six months is required for the delivery in both.

Mr Justice M'LEAN delivered the opinion of the Court.

After stating the case, he proceeded:

Some of the questions which arise in this case are as novel, in this country, as they are interesting. But one case involving similar principles, except a decision by a state court, has occurred; and that was decided by the circuit court of the United States for the district of Pennsylvania, from whose decree no appeal was taken.

The right of the complainants must be first examined. If this right shall be sustained as set forth in the bill, and the defendants shall be proved to have violated it, the court will be bound to give the appropriate redress.

The complainants assert their right on two grounds.

First, under the common law.

Secondly, under the acts of congress.

And they insist, in the first place, that an author was entitled, at common law, to a perpetual property in the copy of his works, and in the profits of their publication; and to recover damages for its injury, by an action on the case, and to the protection of a court of equity.

In support of this proposition, the counsel for the complainants have indulged in a wide range of argument, and have shown great industry and ability. The limited time allowed for the preparation of this opinion, will not admit of an equally extended consideration of the subject by the court.

Perhaps no topic in England has excited more discussion, among literary and talented men, than that of the literary property of authors. So engrossing was the subject, for a long time, as to leave few neutrals, among those who were distin-

guished for their learning and ability. At length the question, whether the copy of a book or literary composition belongs to the author at common law, was brought before the court of king's bench, in the great case of Miller v. Taylor, reported in 4 Burr. 2303. This was a case of great expectation; and the four judges, in giving their opinions, seriatim, exhausted the argument on both sides. Two of the judges, and Lord Mansfield held, that, by the common law, an author had a literary property in his works; and they sustained their opinion with very great ability. Mr Justice Yeates, in an opinion of great length, and with an ability, if equalled, certainly not surpassed, maintained the opposite ground.

Previous to this case, injunctions had issued out of chancery to prevent the publication of certain works, at the instance of those who claimed a property in the copyright, but no decision had been given. And a case had been commenced, at law, between Tonson and Collins, on the same ground, and was argued with great ability, more than once, and the court of king's bench were about to take the opinion of all the judges, when they discovered that the suit had been brought by collusion, to try the question, and it was dismissed.

This question was brought before the house of lords, in the case of Donaldson v. Beckett and others, reported in 4 Burr. 2408.

Lord Mansfield, being a peer, through feelings of delicacy, declined giving any opinion. The eleven judges gave their opinions on the following points. 1st. Whether at common law an author of any book or literary composition, had the sole right of first printing, and publishing the same for sale; and might bring an action against any person who printed, published and sold the same, without his consent. On this question there were eight judges in the affirmative, and three in the negative.

2d. If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition; and might any person, afterward, reprint and sell, for his own benefit, such book or literary composition, against the will of the author. This question was answered in the affirmative, by four judges, and in the negative by seven.

3d. If such action would have lain, at common law, is it taken away by the statute of 8 Anne; and is an author, by

the said statute, precluded from every remedy, except on the foundation of the said statute, and on the terms of the conditions prescribed thereby. Six of the judges, to five, decided that the remedy must be under the statute.

4th. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law. Which question was decided in favour of the author, by seven judges to four.

5th. Whether this right is any way impeached, restrained or taken away, by the statute 8 Anne? Six, to five judges, decided that the right is taken away by the statute. And the lord chancellor, seconding Lord Camden's motion to reverse, the decree was reversed.

It would appear from the points decided, that a majority of the judges were in favour of the common law right of authors, but that the same had been taken away by the statute.

The title and preamble of the statute, 8 Anne, ch. 19, is as follows: "An act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

"Whereas printers, booksellers and other persons, have of late frequently taken the liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, books and other writings without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families," &c.

In 7 Term Rep. 627, Lord Kenyon says, "all arguments in the support of the rights of learned men in their works, must ever be heard with great favour by men of liberal minds to whom they are addressed. It was probably on that account that when the great question of literary property was discussed, some judges of enlightened understanding went the length of maintaining, that the right of publication rested exclusively in the authors and those who claimed under them for all time; but the other opinion finally prevailed, which established that the right was confined to the times limited by the act of parliament. And, that, I have no doubt, was the right decision."

And in the case of the University of Cambridge v. Pryer, 16 East 319, Lord Ellenborough remarked, "it has been said that

the statute of 8 Anne has three objects: but I cannot subdivide the two first; I think it has only two. The counsel for the plaintiffs contended that there was no right at common law; and perhaps there might not be; but of that we have not particularly any thing to do."

From the above authorities, and others which might be referred to if time permitted, the law appears to be well settled in England, that, since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute. And that, notwithstanding the opinion of a majority of the judges in the great case of Miller v. Taylor was in favour of the common law right before the statute, it is still considered, in England, as a question by no means free from doubt.

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realises this product by the transfer of his manuscripts, or in the sale of his works, when first published.

A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his book, that he may realise whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents.

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long; and, perhaps, as usefully to the public, as any distinguished author in the composition of his book.

The result of their labours may be equally beneficial to

society, and in their respective spheres they may be alike distinguished for mental vigour. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly.

It would seem, therefore, that the existence of a principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its rules must conform to sound reason.

Does not the man who imitates the machine profit as much by the labour of another, as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed; and the instruments used in the construction of the others?

That every man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.

But, if the common law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country.

It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.

When, therefore, a common law right is asserted, we must look to the state in which the controversy originated. And in the case under consideration, as the copyright was entered in the clerk's office of the district court of Pennsylvania, for the first volume of the book in controversy, and it was published in that state; we may inquire, whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania.

It is insisted, that our ancestors, when they migrated to this

country, brought with them the English common law, as a part of their heritage.

That this was the case, to a limited extent, is admitted. No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. It was adopted, so far only as its principles were suited to the condition of the colonies: and from this circumstance we see, what is common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine, how far the common law has been introduced and sanctioned in each.

In the argument, it was insisted, that no presumption could be drawn against the existence of the common law, as to copyrights, in Pennsylvania, from the fact of its never having been asserted, until the commencement of this suit.

It may be true, in general, that the failure to assert any particular right, may afford no evidence of the non existence of such right. But the present case may well form an exception to this rule.

If the common law, in all its provisions, has not been introduced into Pennsylvania, to what extent has it been adopted? Must not this court have some evidence on this subject. If no right, such as is set up by the complainants, has heretofore been asserted, no custom or usage established, no judicial decision been given, can the conclusion be justified, that, by the common law of Pennsylvania, an author has a perpetual property in the copyright of his works.

These considerations might well lead the court to doubt the existence of this law in Pennsylvania; but there are others of a more conclusive character.

The question respecting the literary property of authors, was not made a subject of judicial investigation in England until 1760; and no decision was given until the case of Miller v. Taylor was decided in 1769. Long before this time, the colony of Pennsylvania was settled. What part of the common law did Penn and his associates bring with them from Engand?

The literary property of authors, as now asserted, was then unknown in that country. Laws had been passed, regulating the publication of new works under license. And the king, as the head of the church and the state, claimed the exclusive

right of publishing the acts of parliament, the book of common prayer, and a few other books.

No such right at the common law had been recognized in England, when the colony of Penn was organized. Long afterwards, literary property became a subject of controversy, but the question was involved in great doubt and perplexity; and a little more than a century ago, it was decided by the highest judicial court in England, that the right of authors could not be asserted at common law, but under the statute. The statute of 8 Anne was passed in 1710.

Can it be contended, that this common law right, so involved in doubt as to divide the most learned jurists of England, at a period in her history, as much distinguished by learning and talents as any other; was brought into the wilds of Pennsylvania by its first adventurers. Was it suited to their condition?

But there is another view still more conclusive.

In the eighth section of the first article of the constitution of the United States it is declared, that congress shall have power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." And in pursuance of the power thus delegated, congress passed the act of the 30th of May 1790.

This is entitled "an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned."

In the first section of this act, it is provided, "that from and after its passage, the author and authors of any map, chart, book or books, already printed within these United States, being a citizen, &c. who hath or have not transferred to any other person the copyright of such map, chart, book or books, &c. shall have the sole right and liberty of printing, reprinting, publishing and vending such map, book or books, for fourteen years."

In behalf of the common law right, an argument has been drawn from the word *secure*, which is used in relation to this right, both in the constitution and in the acts of congress. This word, when used as a verb active, signifies to protect, insure, save, ascertain, &c.

The counsel for the complainants insist that the term, as used, clearly indicates an intention, not to originate a right, but to protect one already in existence.

There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected. By this rule the word *secure*, as used in the constitution, could not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors, and it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.

And if the word *secure* is used in the constitution, in reference to a future right, was it not so used in the act of congress?

But, it is said, that part of the first section of the act of congress, which has been quoted, a copyright is not only recognized as existing, but that it may be assigned, as the rights of the assignee are protected, the same as those of the author.

As before stated, an author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript, would be protected by a court of chancery. This is presumed to be the copyright recognized in the act, and which was intended to be protected by its provisions. And this protection was given, as well to books published under such circumstances, as to manuscript copies.

That congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear, from the provision that the author, &c. "shall have the sole right and liberty of printing," &c. Now if this exclusive right existed at common law, and congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested. Such a presumption is refuted by the words above quoted, and their force is not lessened by any other part of the act.

Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.

From these considerations i would seem, that if the right of the complainants can be sustained, it must be sustained under the acts of congress. Such was, probably, the opinion of the counsel who framed the bill, as the right is asserted under the statutes, and no particular reference is made to it as existing at common law. The claim, then, of the complainants, must be examined in reference to the statutes under which it is asserted.

There are but two statutes which have a bearing on this subject; one of them has already been named, and the other was passed the 29th of April 1802.

The first section of the act of 1790 provides, that an author, or his assignee, "shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years, from the recording of the title thereof in the clerk's office, as hereinafter directed: and that the author, &c. in books not published, &c. shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years, from the time of recording the title thereof in the clerk's office, as aforesaid. And at the expiration of the said term, the author, &c. shall have the same exclusive right continued to him, &c. for the further term of fourteen years: provided he or they shall cause the title thereof to be a second time recorded, and published in the same manner as is hereinafter directed, and that within six months before the expiration of the first term of fourteen years."

The third section provides, that "no person shall be entitled to the benefit of this act, &c., unless he shall first deposit, &c., a printed copy of the title in the clerk's office, &c." "And such author or proprietor, shall within two months from the date thereof, cause a copy of said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks."

And the fourth section enacts that "the author, &c., shall, within six months after the publishing thereof, deliver or cause to be delivered to the secretary of state, a copy of the same, to be preserved in his office."

The first section of the act of 1802 provides, that "every person who shall claim to be the author, &c., before he shall

be entitled to the benefit of the act entitled an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the time therein mentioned, he shall, in addition to the requisites enjoined in the third and fourth sections of said act, if a book or books, give information by causing the copy of the record which by said act he is required to publish, to be inserted in the page of the book next to the title."

These are substantially the provisions by which the complainants' right must be tested. They claim under a renewal of the term, but this necessarily involves the validity of the right under the first as well as the second term. In the language of the statute, the "same exclusive right" is continued the second term that existed the first.

It will be observed, that a right accrues under the act of 1790, from the time a copy of the title of the book is deposited in the clerk's office. But the act of 1802 adds another requisite to the accruing of the right, and that is, that the record made by the clerk, shall be published in the page next to the title page of the book.

And it is argued with great earnestness and ability, that these are the only requisites to the perfection of the complainants' title. That the requisition of the third section to give public notice in the newspapers, and that contained in the fourth to deposit a copy in the department of state; are acts subsequent to the accruing of the right, and whether they are performed or not, cannot materially affect the title.

The case is compared to a grant with conditions subsequent, which can never operate as a forfeiture of the title. It is said also that the object of the publication in the newspapers, and the deposite of the copy in the department of state was merely to give notice to the public; and that such acts, not being essential to the title, after so great a lapse of time, may well be presumed. That if neither act had been done, the right of the party having accrued, before either was required to be done, it must remain unshaken.

This right, as has been shown, does not exist at common law—it originated, if at all, under the acts of congress. No one can deny that when the legislature are about to vest an exclusive right in an author or an inventor, they have the

power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law.

This principle is familiar, as it regards patent rights; and it is the same in relation to the copyright of a book. If any difference shall be made, as it respects a strict conformity to the law, it would seem to be more reasonable to make the requirement of the author, rather than the inventor.

The papers of the latter are examined in the department of state, and require the sanction of the attorney-general; but the author takes every step on his own responsibility, unchecked by the scrutiny or sanction of any public functionary.

The acts required to be done by an author, to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the department of state.

A right undoubtedly accrues on the record being made with the clerk, and the printing of it as required; but what is the nature of that right. Is it perfect? If so, the other two requisites are wholly useless.

How can the author be compelled either to give notice in the newspaper, or deposit a copy in the state department. The statute affixes no penalty for a failure to perform either of these acts; and it provides no means, by which it may be enforced.

But we are told they are unimportant acts. If they are indeed wholly unimportant, congress acted unwisely in requiring them to be done. But whether they are important or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature, we can learn only by their official acts.

Judging then of these acts by this rule, we are not at liberty to say they are unimportant and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance?

But the inquiry is made, shall the non performance of these subsequent conditions operate as a forfeiture of the right?

The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests; and this was essential to its protection under the statute: but other acts are to be done, unless congress have legislated in vain, to render the right perfect.

The notice could not be published until after the entry with the clerk, nor could the book be deposited with the secretary of state until it was published. But these are acts not less important than those which are required to be done previously. They form a part of the title, and until they are performed, the title is not perfect.

The deposite of the book in the department of state, may be important to identify it at any future period, should the copyright be contested, or an unfounded claim of authorship asserted.

But, if doubts could be entertained whether the notice and deposite of the book in the state department, were essential to the title, under the act of 1790; on which act my opinion is principally founded; though I consider it in connexion with the other act; there is, in the opinion of three of the judges, no ground for doubt under the act of 1802. The latter act declares that every author, &c. before he shall be entitled to the benefit of the former act, shall, "in addition to the requisitions enjoined in the third and fourth sections of said act, if a book, publish," &c.

Is not this a clear exposition of the first act? Can an author claim the benefit of the act of 1790, without performing "the requisites enjoined in the third and fourth sections of it." If there be any meaning in language, the act of 1802, the three judges think, requires these requisites to be performed "in addition" to the one required by that act, before an author, &c. "shall be entitled to the benefit of the first act."

The rule by which conditions precedent and subsequent are construed, in a grant, can have no application to the case under consideration; as every requisite, in both acts, is essential to the title.

A renewal of the term of fourteen years, can only be ob-

tained by having the title page recorded with the clerk, and the record published on the page next to that of the title, and public notice given within six months before the expiration of the first term.

In opposition to the construction of the above statutes, as now given, the counsel for the complainants referred to several decisions in England, on the construction of the statute of 8 Anne, and other statutes.

In the case of Beckford v. Hood, 7 Term Rep. 620, the court of king's bench decided, "that an author, whose work is pirated before the expiration of twenty-eight years from the first publication of it, may maintain an action on the case for damages, against the offending party, although the work was not entered at Stationers Hall." But this entry was necessary only to subject the offender to certain penalties, provided in the statute of 8 Anne. The suit brought was not for the penalties, and consequently, the entry of the work at Stationers Hall, was not made a question in the case. In the case of Blackwell v. Harper, 2 Atk. 95, Lord Hardwicke is reported to have said, upon the act of 8 Anne, c. 19, "the clause of registering with the Stationers Company, is relative to the penalty, and the property cannot vest without such entry;" for the words are, "that nothing in this act shall be construed to subject any bookseller, &c. to the forfeitures, &c. by reason of printing any book, &c. unless the title to the copy of such book, hereafter published, shall, before such publication, be entered in the register book of the Company of Stationers."

The very language quoted by his lordship shows, that the entry was not necessary to an investiture of the title, but to the recovery of the penalties provided in the act against those who pirated the work.

His lordship decided in the same case, that "under an act of parliament, providing that a certain inventor shall have the sole right and liberty of printing and reprinting certain prints for the term of fourteen years, and to commence from the day of first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints," the property in the prints vests absolutely in the engraver, though the day of publication is not mentioned."

The authority of this case is seriously questioned in the case of Newton v. Cowie, 4 Bingham 241. And it would seem, from the decision of Lord Hardwicke, that he had doubts of the correctness of the decision, as he decreed an injunction, without by-gone profits. And Lord Alvanly, in the case of Harrison v. Hogg, cited in 4 Bing. 242, said "that he was glad he was relieved from deciding on the same act, as he was inclined to differ from Lord Hardwicke."

By a reference to the English authorities in the construction of statutes, somewhat analogous to those under which the complainants set up their right, it will be found that the decisions often conflict with each other; but it is believed that no settled construction has been given to any British statute, in all respects similar to those under consideration, which is at variance with the one now given. If, however, such an instance could be found, it would not lessen the confidence we feel in the correctness of the view which we have taken.

The act of congress under which Mr Wheaton, one of the complainants, in his capacity of reporter, was required to deliver eighty copies of each volume of his reports to the department of state, and which were, probably, faithfully delivered, does not exonerate him from the deposite of a copy under the act of 1790. The eighty volumes were delivered for a different purpose; and cannot excuse the deposite of the one volume as specially required.

The construction of the acts of congress being settled, in the further investigation of the case it would become necessary to look into the evidence and ascertain whether the complainants have not shown a substantial compliance with every legal requisite. But on reading the evidence we entertain doubts, which induce us to remand the cause to the circuit court, where the facts can be ascertained by a jury.

And the cause is accordingly remanded to the circuit court, with directions to that court to order an issue of facts to be examined and tried by a jury, at the bar of said court, upon this point, viz. whether the said Wheaton as author, or any other person as proprietor, had complied with the requisites prescribed by the third and fourth sections of the said act of congress, passed the 31st day of May 1790, in regard to the volumes of Wheaton's Reports in the said bill mentioned, or in

regard to one or more of them in the following particulars, viz. whether the said Wheaton or proprietor did, within two months from the date of the recording thereof in the clerk's office of the district court, cause a copy of the said record to be published in one or more of the newspapers printed in the resident states, for the space of four weeks; and whether the said Wheaton or proprietor after the publishing thereof, did deliver or cause to be delivered to the secretary of state of the United States, a copy of the same to be preserved in his office, according to the provisions of the said third and fourth sections of the said act.

And if the said requisites have not been complied with in regard to all the said volumes, then the jury to find in particular in regard to what volumes they or either of them have been so complied with.

It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.

Mr Justice THOMPSON, dissenting.

It is matter of regret with me, at any time to dissent from an opinion pronounced by a majority of this court, and where my mind is left balancing, after a full examination of the case, my habitual respect for the opinion of my brethren may justify a surrender of my own. But where no such apology is left to me to rest upon, it becomes a duty to adhere to my own opinion; and I shall proceed to assign the reasons which have led me to a conclusion different from that at which a majority of the court has arrived.

It is unnecessary for me to state any thing more with respect to the bill and answer, than barely to observe that the complainants in the court below rest their claim, both upon the statutory and the common law right. The bill charges, that all the provisions of the acts of congress have been complied with; that every thing has been done which was required by those acts in order to entitle them to the benefit thereof; and that if it were otherwise, the orator, Henry Wheaton, has, as the author of said reports, the property in the copy of the same, and the sole right to enjoy and dispose of the same.

It would be improper in the present stage of this cause to examine the evidence which was before the court below, touching certain questions of fact which it is alleged are required by the acts of congress in order to entitle the complainants to the benefit of those acts, have been complied with. An issue has been directed to inquire into those matters. Nor is it deemed necessary to examine whether the publication of the Condensed Reports by the defendants, is a violation of the complainants' copyright, if they have complied with all the requisites of the acts of congress. This would seem necessarily implied, by the ordering of the issue; for such inquiries would be useless, if the right secured under those acts has not been violated.

I shall therefore confine myself to an examination of the common law right, and the effect and operation of the acts of congress upon such right.

I think I may assume as a proposition not to be questioned, that in England, prior to the statute of Anne, the right of an author to the benefit and profit of his work, is recognized by the common law. No case has been cited on the argument, and none has fallen under my observation, at all throwing in doubt this general proposition. Whenever the question has been there agitated, it has been in connection with the operation of the statute upon this right. The case of Miller v. Taylor, 4 Burr. 2303, decided in the year 1769, was the first determination in the court of king's bench upon the common law right of literary property. In that case the broad question is stated and examined, whether the copy of a book or literary composition belongs to the author by the common law; and three of the judges, including Lord Mansfield, decided in the affirmative. Mr Justice Yeates dissented. But I am not aware that upon this abstract question a contrary decision has ever been made in England. This would seem to be sufficient to put at rest that general question, and render it unnecessary to go into a very particular examination of the reasons and grounds upon which the decision was founded. The elaborate examination bestowed upon the question by the judges in that case, has brought into view, on both sides of the question, the main arguments of which the point is susceptible. The great principle on which the author's right rests, is, that it is the

fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property, as well as by the faculties of the body; and it is difficult to perceive any well founded objection to such a claim of right. It is founded upon the soundest principles of justice, equity and public policy. Blackstone, in his Commentaries, 2d vol. 405, has succinctly stated the principle, that when a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases; and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. That the identity of a literary composition consists entirely in the sentiment and the language. The same conception, clothed in the same words, must necessarily be the same composition; and whatever method be taken to exhibit that composition to the ear or to the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man, it has been thought, can have a right to exhibit it, especially for profit, without the author's consent. The origin of this right is not probably to be satisfactorily ascertained, and indeed if it could, it might be considered an objection to its existence as a common law right; but from the time of the invention of printing, in the early part of the fifteenth century, such a right seems to have been recognized. The historical account of the recognition of the right, is to be collected from the discussions in Miller v. Taylor. The Stationers Company was incorporated in the year 1556, and from that time to the year 1640 the crown exercised an unlimited authority over the press, which was enforced by the summary process of search, confiscation and imprisonment, given to the Stationers Company, and executed by the then supreme jurisdiction of the star chamber. In the year 1640 the star chamber was abolished; and the existence of copyrights before that period, upon principles of usage, can only be looked for in the Stationers Company, or the star chamber or acts of state; and the evidence upon this point, says Mr Justice Wills, is liable to little suspicion. It was indifferent to the views of government whether the property of an innocent book licensed, was open or private property.

It was certainly against the power of the crown to allow it as private property, without being protected by any royal privilege. It could be done only on principles of private justice, moral fitness and public convenience, which, when applied to a new subject, make common law, without a precedent; much more when received and approved by usage. And in this case of Miller v. Taylor, it was found by the special verdict, "that before the reign of her late majesty, queen Anne, it was usual to purchase from authors the *perpetual copyright* of their books, and to assign the same from hand to hand for valuable consideration, and to make the same the subject of family settlements, for the provision of wives and children." This usage is evidence of the common law, and shows that the copyright was considered and treated as property, transferable from party to party; and property, too, of a permanent nature, suitable for family settlement and provisions.

Common law, says Lord Coke, 1 Inst. 1, 2, is sometimes called right, common right, common justice. And Lord Mansfield says, the common law is drawn from the principles of right and wrong, the fitness of things, convenience and policy. And it is upon these principles that the copyright of authors is protected. After the year 1640, when the press became subject to license, the various ordinances and acts of parliament referred to in Miller v. Taylor, and collected in Maugham's treatise on the Law of Literary Property, p. 13—16, necessarily imply, and presuppose, the existence of a common law right in the author.

The common law, says an eminent jurist, 2 Kent's Comm. 471, includes those principles, usages and rules of action, applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature. A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice, and of cultivated reason, to particular cases. In the just language of sir Matthew Hale, the common law of England is not the product of the wisdom of some one man, or society of men, in any

one age, but of the wisdom, counsel, experience and observation of many ages of wise and observing men. And, in accordance with these sound principles, and as applicable to the subject of copyright, are the remarks of Mr Christian, in his notes to Blackstone's Commentaries, 2 Bl. Comm. 06, and note. Nothing, says he, is more erroneous, than the practice of referring the origin of moral rights, and the system of natural equity, to the savage state, which is supposed to have preceded civilized establishments, in which literary composition, and, of consequence, the right to it, could have no existence. But the true mode of ascertaining a moral right, is to inquire whether it is such as the reason, the cultivated reason of mankind must necessarily assent to. No proposition seems more conformable to that criterion, than that every one should enjoy the reward of his labour, the harvest where he has sown, or the fruit of the tree which he has planted. Whether literary property is sui generis, or under whatever denomination of rights it may be classed, it seems founded upon the same principle of general utility to society, which is the basis of all other moral rights and obligations. Thus considered, an author's copyright ought to be esteemed an invaluable right, established in sound reason and abstract morality.

It is unnecessary, for the purpose of showing my views upon this branch of the case, to add any thing more. In my judgment, every principle of justice, equity, morality, fitness and sound policy concurs, in protecting the literary labours of men, to the same extent that property acquired by manual labour is protected. The objections to the admission of the common law right of authors, are generally admitted to be summed up, in all their force and strength, by Mr Justice Yeates, in the case of Miller v. Taylor. These objections may be classed under two heads: the one founded upon the nature of the property or subject matter of the right claimed; and the other on the presumed abandonment of the right by the author's publication.

The first appears to me to be too subtle and metaphysical to command the assent of any one, or to be adopted as the ground of deciding the question. It seems to be supposed, that the right claimed is to the ideas contained in the book. The claim, says Mr Justice Yeates, is to the style and ideas of the author's composition; and it is a well established maxim, that

nothing can be an object of property which has not a corporal substance. The property claimed is all ideal; a set of ideas which have no bounds or marks whatever—nothing that is capable of a visible possession—nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone. Incapable of any other modes of acquisition or enjoyment than by mental possession or apprehension; safe and invulnerable from their own immateriality, no trespass can reach them, no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff of.

He asks, can sentiments themselves (apart from the paper on which they are contained) be taken in execution for a debt; or if the author commits treason or felony, or is outlawed, can the ideas be forfeited? Can sentiments be seized; or, by any act whatever, be vested in the crown? If they cannot be seized, the sole right of publishing them cannot be confined to the author. How strange and singular, says he, must this extraordinary kind of property be, which cannot be visibly possessed, forfeited or seized, nor is susceptible of any external injury, nor, consequently, of any specific or possible remedy.

These, and many other similar declarations are made by Mr Justice Yeates, to illustrate his view of the nature of a copyright. And he seems to treat the question, as if the claim was to a mere idea, not embodied or exhibited in any tangible form or shape. No such pretension has ever been set up, that I am aware of, by any advocate of the right to literary property. And this view of it would hardly deserve a serious notice, had it not been taken by a distinguished judge. Lord Mansfield, in the case of Miller v. Taylor, in defining the nature of the right or copyright, says, "I use the word copy in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of something intellectual, communicated by letters;" and this is the sense in which I understand the term copyright always to be used, when spoken of as property.

The other objection urged by Mr Justice Yeates, that the publication by the author is an abandonment of the exclusive

right, rests upon more plausible grounds, but is equally destitute of solidity.

This would seem, according to his view of the case, the main point in the cause. The general question, he says, is, whether, after a voluntary and *general publication* of an author's work by himself, or by his authority, the author has a sole and perpetual property in that work, so as to give him a right to confine every subsequent publication to himself, or his assigns, for ever.

And he lays down this general proposition. That the right of publication must for ever depend on the claimant's property in the thing to be published. Whilst the subject of publication continues his own exclusive property, he will so long have the sole and perpetual right to publish it. But whenever that property ceases, or by any act or event becomes common, the right of publication will be equally common. The particular terms in which Mr Justice Yeates states his proposition, are worthy of notice. He puts the case upon its being a *general publication*, the meaning of which undoubtedly is, that the publication is without any restriction expressed or implied, as to the use to be made of it by the party into whose hands it might come, by purchase or otherwise. Unless such was his meaning, the proposition, I presume, no one will contend, can be maintained. Suppose an express contract made with a party who shall purchase a book, that he shall not republish it; this surely would be binding upon him.

So, if the bookseller should give a like notice of the author's claim, and a purchase of a book made without any express stipulation not to republish, the law would imply an assent to the condition. And any circumstances from which such an undertaking could be reasonably inferred, would lead to the same legal consequences. The nature of the property, and the general purposes for which it is published and sold, show the use which is to be made of it. The usual and common object which a person has in view in the purchase of a book is for the instruction, information or entertainment to be derived from it, and not for republication of the work. It is the use of it for these purposes which is implied in the sale and purchase. And this use is in subordination to the antecedent and higher right of the author; and comes strictly within the maxim, sic utere

tuo ut alienam non lædas. But the case is not left to rest on any implied notice of the author's claim, and the conditions on which he makes it public. This is contained on the title page of the very book purchased, and cannot be presumed to escape the notice of the purchaser. It is there, in terms, announced, that the author claims the right of publication; and whoever purchases, therefore, does it with notice of such claim, and is bound to use it in subordination thereto. Mr Justice Yeates admits, that every man is entitled to the fruits of his own labour; but that he can be entitled to it only, subject to the general rights of mankind, and the general rules of property; and that there must be a limitation to such right, otherwise the rights of others are infringed. The force of such limitation upon the right, is not readily perceived. If the right exists, it is a common law right, growing out of the natural justice of the case; being the result of a man's own labour. He thinks the statute of Anne fixes a just limitation. But suppose no statute had been passed on the subject; where would have been the limitation? The right existing, who would have authority to say where it should end? It must necessarily be without limitation, and it is no infringement of the rights of others. They enjoy it for the purpose intended, and according to the nature of the property. The purchaser of the book has a right to all the benefit resulting from the information or amusement he can derive from it. And if, in consequence thereof, he can write a book on the same subject, he has a right so to do. But this is a very different use of the property from the taking and publishing the very language and sentiment of the author; which constitute the identity of his work.

Mr Justice Yeates puts the effect of a publication upon the ground of intent in the author. The act of publication, says he, when voluntarily done by the author, is virtually and necessarily a gift to the public. And he must be deemed to have so intended it. But no such intention can surely be inferred, when the contrary intention is inscribed upon the first page of the book, which cannot escape notice.

The case of Percival v. Phipps, 2 Ves. and Beam. 19, recognises the implied prohibition against publishing the work of another, arising from the very nature of the property. It was held in that case, that private letters, having the character

of literary composition, were within the spirit of the act protecting literary property, and that by sending a letter, the writer did not give the receiver authority to publish it; and this is the doctrine of Lord Hardwicke in Pope v. Carl, 2 Atk. 342, where it is said that familiar letters may form a literary composition, in which the author retains his copyright, and does not, by sending them to the person to whom they are addressed, authorise him or a third person to use them for the purpose of profit, by publishing them against the interest and intention of the author. That by sending the letter, though he parts with the property of the paper, he does not part with the property of copyright in the composition.

But how stands the case, with respect to the effect of publication by the author, according to Mr Justice Yeates's own rule. He says, "in all abandonments of such kind of property, two circumstances are necessary," an actua relinquishing the possession, and an *intention* to relinquish it. That the author's name being inserted in the title page is no reason against the abandonment; for many of our best and noblest authors have published their works from more generous views than pecuniary profit. Some have written for fame, and the benefit of mankind. That the omission of the author's name can make no difference; for if the property be absolutely his, he has no occasion to add his name to the title page. He cannot escape, it seems, from calling the copyright *property*, although a mere *idea*; and resorts again to his favourite theory, that it has no indicia, no distinguishing marks to denote his proprietary interest therein; and hard, says he, would be the law, that should adjudge a man guilty of a crime, when he had no possibility of knowing that he was doing the least wrong to any individual. That he could not know who was the proprietor of these intellectual ideas, they not having any ear-marks upon them, or tokens of a particular proprietor.

If, as Mr Justice Yeates admits, it is a question of *intention* whether the author meant to abandon his work to the public, and relinquish all private or individual claims to it, no possible doubt can exist as to the conclusion in the present case. Would a jury hesitate a moment upon the question under the evidence before the court? The right set up and stamped upon the title *page* of the book, shuts the door against any infer-

ence, that the publication was intended to be a gift to the public.

Mr Justice tes admits, that so long as a literary composition is in man ipt, and remains under the sole dominion of the author, it is his exclusive property. It would seem, therefore, that the *idea* when once reduced to writing, is susceptible of identity, and becomes the subject of property. But property without the right to use it, is empty sound, says Mr Justice Aston in Miller v. Taylor. And, indeed, it would seem a mere mockery for the law to recognize any thing as property, which the owner could not use safely and securely for the purposes for which it was intended, unless interdicted, by the principles of morality or public policy.

It is not necessary that I should go into any particular examination of the construction of the statute of Anne, or to what extent it may affect the common law right of authors in England; because, as I shall hereafter show, that statute was never considered in force in Pennsylvania. The mere common law right, uninfluenced by that statute, is alone drawn in question under this branch of the case. And the decision in the case of Miller v. Taylor, would seem to put that question at rest in England, at that day. Mr Justice Yeates, in aid of his opinion, relied much upon that statute; arguing that from the title, which is an "act for the encouragement of learning by *vesting* the copies of printed books in the authors or purchasers of such copies during the times therein mentioned;" and from the provision in the act, that the *sole right* should be vested, &c. for twenty-one years and *no longer;* the right was *created*, and limited by the act, and did not rest upon the common law. The other three judges, however, maintained, that an author's right was not derived from the statute, but that he had an original perpetual common law right and property in his work, and that the statute was only cumulative, and giving additional remedies for a violation of the right. That the preamble in the act proceeds upon the ground of a right of property in the author having been violated; and that the act was intended as a confirmation of such right. And that from the remedy enacted against the violation of the right being only temporary, it might be argued, that it afforded an implication, that there existed no right but what was

secured by the act. To guard against which, there is an express saving in the ninth section of the act. "Provided that nothing in this act contained, shall extend or be construed to extend either to prejudice or confirm *any right*, that the said universities or any of them, *or any person or persons*, have or claim to have to the printing or reprinting, any book or copy already printed or hereafter to be printed." That the words *any right*, manifestly meant any *other* right, than the term secured by the act. It may be observed here, that whatever may be the just weight to be given to the term "*vested*" and the words "*no longer*," as used in the statute of Anne, and so much relied on by Mr Justice Yeates, have no application to our acts of congress; no such term or provision being used. A writ of error was brought in this case of Miller v. Taylor, but afterwards abandoned, and the law was considered settled, until called in question in Donaldson v. Beckett, 4 Burr. 2408, which came before the house of lords in the year 1774, upon an appeal from a decree of the court of chancery, founded upon the judgment in Miller v. Taylor.

Upon this appeal certain questions were propounded to the twelve judges. Lord Mansfield, however gave no opinion, it being very unusual, as the reporter states, from reasons of delicacy, for a peer to support his own judgment upon appeal to the house of lords. This statement necessarily implies, however, that he had not changed his opinion. There were, therefore, eleven judges who voted upon the questions.

One of the questions propounded was: whether, at common law, an author of any book or literary composition, had the sole right of *first printing* and publishing the same for sale, and might bring an action against any person who printed, published and sold the same without his consent.

Upon this question ten voted in the affirmative, and one in the negative.

Another question was: if the author had such right originally, *did the law take it away, upon his printing and publishing* such book or literary composition, and might any person, afterwards, reprint and sell, for his own benefit, such book or literary composition, against the will of the author.

Upon this question seven were in the negative, and four in the affirmative.

The vote upon these two questions settled the point, that, by the common law, the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity.

Another question propounded was: if an action would have lain, at common law, is it taken away by the statute of Anne? and is an author, by the said statute, precluded from every remedy, except on the foundation of the statute, and on the terms and conditions prescribed thereby?

Upon this question, six voted in the affirmative, and five in the negative; and it will be perceived, that if Lord Mansfield had voted on this question, and in conformity with his opinion in Miller v. Taylor, the judges would have been equally divided.

That the law in England has not been considered as settled, in conformity with the vote on this last question, is very certain. For it is the constant practice, in chancery, to grant injunctions to restrain printers from publishing the works of others, which practice can only be sustained on the ground that the penalties given by the statute, are not the only remedy that can be resorted to. In Miller v. Taylor, Lord Mansfield says, the whole jurisdiction exercised by the court of chancery, since 1710, the date of the statute of Anne, against pirates of copies, is an authority that authors had a property antecedent, to which the act gives a temporary additional *security*. It can stand upon no other foundation. And in the case of Beckford v. Hood, 7 Term Rep. 616, it was decided, that an author whose work is pirated before the expiration of the time limited in the statute, may maintain an action on the case for damages, against the offending party. Lord Kenyon says, the question is, whether the right of property being vested in authors for certain periods, the common law remedy for a violation of it, does not attach within the time limited by the act of parliament. Within those periods, the act says, that the author shall have the sole right and liberty of printing, &c. Thus the statute having vested that right in the author, the common law gives the remedy by action in the case for violation of it; and that the meaning of the act in creating the penalties, was to give an accumulative remedy. And in this all the judges concurred. And Mr Justice Grose ob-

serves, that in the great case of Miller v. Taylor, Mr Justice Yeates gave his opinion against the common law right of authors; but he was decidedly of opinion, that an exclusive right of property was vested by the statute for the time limited; and he says, that by the decision in the house of lords of Donaldson v. Beckett, the common law right of action is not considered as taken away by the statute of Anne, but that it could not be exercised beyond the time limited by that statute: and it is worthy of notice that this action on the case, for damages, was sustained, although the work was not entered at Stationers Hall, nor the author's name affixed to the first publication. This, Lord Kenyon observes, was to serve as a notice and warning to the public, that none might ignorantly incur the penalties and forfeitures given against such as pirate the works of others. But calling on a party who has injured the civil property of another, for a remedy in damages, cannot properly fall under the description of a forfeiture or penalty.

From this view of the law, as it stands in England, it is very clear that, previous to the statute of Anne, the perpetual common law right of authors, was undisputed. That after that statute, in the case of Miller v. Taylor, it was held, that this common law right remained unaffected by the statute, which only gave a cumulative remedy. That the subsequent case of Donaldson v. Beckett, limited the right to the times mentioned in the statute. But that for all violations of the right during that time, all the common law remedies continued, although no entry of the work at Stationers Hall had been made, according to the provisions of the statute. Such entry being necessary, only for the purpose of subjecting the party violating the right, to the penalties given by the act.

I do not deem it necessary particularly to inquire, whether, as an abstract question, the same reasons do not exist for the protection of mechanical iuventions, as the production of mental labour. The inquiry is not, whether it would have been wise to have recognized an exclusive right to mechanical inventions. It is enough, when we are inquiring what the law is, and not what it ought to have been, to find that no such principle ever has been recognized by any judicial decision. The argument was urged with great earnestness by Mr Justice Yeates in Miller v. Taylor, but repudiated by Lord Mansfield and the other

judges. With respect to copyrights, however, the law has been considered otherwise ; and the original common law right fully established, though modified in some respects by the statute of Anne.

I shall proceed, now, to some notice of the light in which copyrights have been viewed in this country.

It appears from the journals of the old congress (8 Journals 257), that this question was brought before that body by sundry papers and memorials on the subject of literary *property;* and which were referred to a committee, of which Mr Madison was one ; and on the 27th of May 1783, the following resolution was reported and adopted.

" Resolved, that it be recommended to the several states, to *secure* to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copyright of such books for a certain time, not less than fourteen years from the first publication ; and to *secure* to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copyright of such books for another term or time, not less than fourteen years ; such copy or exclusive right of printing, publishing and vending the same, to be *secured* to the original authors or publishers, their executors, administrators and assigns, by such laws and such restrictions, as to the several states may seem proper."

This right is here treated and dealt with as property already existing; and not as creating any thing which had previously no being. It is spoken of as something tangible, that might pass to executors and administrators, and transferable by assignment. And the recommendation to the states was, to pass laws to *secure* such right.

It must be presumed, that congress understood the light in which this subject was viewed in the mother country. And it is deserving of notice, that Mr Madison, one of the committee, afterwards wrote the number in the Federalist, where this subject is discussed; and where it is expressly asserted, that this has been adjudged in England to be a right at common law.

And it is worthy of remark also, that no mention is here made of any right in mechanical inventions: and although the arts and sciences are connected in the same clause in the con-

stitution, and placed under the legislative power of congress, it does not, by any means follow, that they were considered as standing on the same footing.

Several of the states had already passed laws on this subject; and many others, in compliance with the recommendation of congress, did the same.

The state of Massachusetts, as early as March 1783, passed a law, entitled, "an act for the purpose of *securing* to authors, the exclusive right and benefit of publishing their literary productions for twenty-one years." The preamble to this act shows, in a strong and striking manner, the views entertained at that day in this enlightened state, of the value of this right. "Whereas, the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness greatly depend on the efforts of learned and ingenious persons, in the various arts and sciences; as the principal encouragement such persons can have, to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry, to themselves; and as such security is one of the natural rights of all men, there being no *property* more peculiarly a man's own, than that which is produced by the labour of his mind: therefore, to encourage learned and ingenious persons to write useful books, for the benefit of mankind, be it enacted," &c. The act then proceeds to declare, that all books, treatises and other literary works, &c. shall be the sole property of the author or authors, being subjects of the United States of America, their heirs and assigns, for the full and complete term of twenty-one years from the date of their first publication. And certain penalties are affixed to a violation of the right, with a proviso, that the act shall not be construed to extend in favour, or for the benefit of any author, or subject of any other of the United States, until the state of which such author is a subject, shall have passed similar laws for securing to authors the exclusive right and benefit of publishing their literary productions. 1 Laws Mass. 94.

This act recognizes in the fullest and most unqualified manner, the natural right which an author has to the productions and labour of his own mind. And it is worthy of notice, that the act does not recognize as a natural right, or in any manner

provide for the protection of mechanical inventions; thereby showing the distinction between mental and manual labour in the view of that legislature, although it is now attempted to put them on the same footing.

The state of Connecticut had, previously, in the same year (January 1783), passed an act for the encouragement of literature and genius, containing the following preamble: "whereas it is perfectly agreeable to the principles of natural justice and equity, that every author should be *secured* in receiving the profits that may arise from the sale of his works; and such security may encourage men of learning and genius to publish their writings, which may do honour to their country, and service to mankind." Certain provisions are then made for the security of such right, which it is unnecessary here to be particularly noticed.

There is a like proviso as in the Massachusetts act: that the benefit of the law is not to extend to authors, inhabitants of, or residing in other states, until such states have passed similar laws. Statutes of Conn. 474. This law is also confined to literary productions, and in no manner extending to mechanical labours.

In the colony of New York, in the year 1786, a law "to promote literature" was passed, reciting, "whereas, it is agreeable to the principles of natural equity and justice, that every author should be *secured* in receiving the profits that may arise from the sale of his works; and such security may encourage persons of learning and genius to publish their writings, which may do honour to their country, and service to mankind;" and then making provision, for securing to authors the sole right of printing, publishing and selling their works for fourteen years. With a proviso to the fourth section of the act, recognizing a common law right; but leaving it open and unaffected in cases not coming within the act: viz., "provided, that nothing in this act shall extend to, affect, prejudice or confirm the rights which any person may have to the printing or publishing of any books or pamphlets at *common law*, in cases not mentioned in this act."

The state of Virginia also, in the year 1785, passed a similar law, for *securing* to authors of literary works, an exclusive property therein, for a limited time. 1 Rev. Code 534. Like

laws for the same purpose were passed by other states, which are not necessary here to be noticed; enough having been referred to, to show the light in which literary property was viewed in this country; and that such laws were passed, with a view to protect and secure a pre-existing right, founded on the eternal rules and principles of natural right and justice, and recognized by the common law.

But under the existing governments of the United States, before the adoption of the present constitution, adequate protection could not be given to authors throughout the United States, by any general law. It depended on the legislatures of the several states; and this led to the provisions in the present constitution, giving to congress power "to promote the progress of science and the useful arts, by *securing*, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Constit. art. 1, sect. 8.

It has been argued at the bar, that as the promotion of the progress of science and the useful arts, is here united in the same clause in the constitution, the rights of authors and inventors were considered as standing on the same footing; but this, I think, is a non sequitur. This article is to be construed distributively, and must have been so understood; for when congress came to execute this power by legislation, the subjects are kept distinct, and very different provisions are made respecting them. All the laws relative to inventions, purport to be acts to promote the progress of the useful arts. They do not use any language which implies or presupposes any existing prior right *to be secured;* but clearly imply that the whole exclusive right is created by the law, and ends with the expiration of the patent. The first law, passed in the year 1790, 1 Story's Ed. 80, requires that the specification shall be so particular, as not only to distinguish the invention or discovery from other things before known and used, but also to enable a workman, or other person, skilled in the art or manufacture, to make, construct, or use the same, *to the end that the public may have the full benefit thereof, after the expiration of the patent term.* This is the consideration demanded by the public, for the protection during the time mentioned in the patent; and the books furnish no case, that I am aware of, where an ac-

tion has been attempted to be sustained upon any supposed common law right of the inventor.

But the case is quite different with respect to copyrights. All the laws on this subject purport to be made for *securing* to authors and proprietors such copyright. They presuppose the existence of a right, which is to be secured, and not a right originally created by the act. The security provided by the act is for a limited time. But there is no intimation that at the expiration of that time the copy becomes common, as in the case of an invention. The right, at the expiration of the time limited in the acts of congress, is left to the common law protection, without the additional security thrown around it by the statutes; and stands upon the same footing as it did before the statutes were passed. The protection for a limited time by the aid of penalties, against the violators of the right, proceeds upon the ground that the author, within that time, can so multiply his work, and reap such profits therefrom, as to enable him to rest upon his common law right, without the extraordinary aid of penal laws.

In the Federalist, No. 43, written by Mr Madison, who reported the resolution referred to, in the old congress, this clause in the constitution is under consideration, and the writer observes: that the utility of this power will scarcely be questioned. *The copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law.* The right to useful inventions seems, with equal reason, to belong to the inventors. The public good fully coincides, in both cases, with the claims of individuals. The states cannot separately make effectual provision for either of the cases; and most of them have anticipated the decision of this point, by laws passed at the instance of congress.

Although it is here said, that the right to useful inventions seems with equal reason to belong to the inventors, as the copyright to authors: yet it is not pretended that the common law equally recognises them. But the contrary is necessarily implied, when it is expressly said that the copyright has been adjudged to be a common law right, but is silent as to inventors' rights.

The common law right of authors is expressly recognised by Mr Justice Story in his Commentaries. In noticing this

article in the constitution, he says, "this power did not exist under the confederation, and its utility does not seem to have been questioned. The copyright of authors in their works had, before the revolution, been decided in Great Britain to be a common law right, and it was regulated and limited under statutes passed by parliament upon that subject." 3 Story's Com. 48. If these statutes do not affect the right in the case now before the court, it remains and is to be viewed as a common law right.

The judge in the court below, who decided this case, seems to place much reliance on what he considers a doubt, suggested by Chancellor Kent, as to the existence of the common law right. Let us see what he does say. "It was," says he, "for some time the prevailing and better opinion in England, that authors had an exclusive copyright at common law, as permanent as the property of an estate; and that the statute of Anne, protecting by penalties that right for fourteen years, was only an additional sanction, and made in affirmance of the common law. This point came at last to be questioned, and it became the subject of a very serious litigation in the court of king's bench. It was decided in Miller v. Taylor, 1769, that every author had a common law right in perpetuity, independent of statute, to the exclusive printing and publishing his original compositions. The court was not unanimous, and the subsequent decision of the house of lords, in Donaldson v. Beckett, in February 1774, settled this very litigated question against the opinion of the king's bench, by establishing, that the common law right of action, *if any existed*, could not be exercised beyond the time limited by the statute of Anne, 2 Com. 375, second ed. It is here fully admitted, that by the decision in Miller v. Taylor, every author had a common law right in perpetuity, to the publishing of his original composition. And, if it was intended to intimate, that the subsequent decision, in Donaldson v. Beckett, overruled this decision, as to the common law right; I apprehend, this must be a mistake, according to the report of the case in 4 Burr. I understand the decision then was, by ten of the judges, that at common law an author had the sole right of *first printing* and publishing his work, and by seven judges to four, that such right continued after his *first publication*. It is true, it

was decided by six to five of the judges, that the common law right of action could not be exercised beyond the time limited by the statute of Anne. But with the construction of this statute, we have no concern, if it was not in force in Pennsylvania. The settlement of the common law right is the material point, and that is admitted, by Chancellor Kent, to have been decided in favour of the author. There is certainly considerable obscurity in the report of this case, as to how far it has modified the common law remedy: this arises probably from the manner in which the questions were propounded by the house of lords to the judges.

I do not perceive how it becomes necessary in this case to decide the question, whether we have here any code of laws, known and regarded as the common law of the United States. This case presents a question respecting the right of property, and in such cases the state laws form the rules of decision in the courts of the United States; and the case now before the court must be governed by the law of copyright in the state of Pennsylvania. The complainants, though citizens of New York, are entitled to the benefit of those laws for the protection of their property; and have a right to prosecute their suit in the courts of the United States.

If, by the common law of England, an author has the copyright in his literary compositions, it becomes necessary to inquire whether that law is in force in the state of Pennsylvania.

It was very properly admitted by the court below, on the trial of this cause, that when the American colonies were first settled by our ancestors, it was held as well by the settlers, as by the judges and lawyers of England, that they brought with them, as a birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances; and that each colony judged for itself, what parts of the common law were applicable to its new condition. Mr Justice Story recognises the same principle in his Commentaries, vol. 1, 137 to 140. Englishmen, says he, removing to another country, must be deemed to carry with them those rights and privileges which belong to them in their native country; and that the plantations formed in this country were to be deemed a part of the ancient domin-

ions, and the subjects inhabiting them to belong to a common country, and to retain their former rights and privileges. That the universal principle has been (and the practice has conformed to it), that the common law is our birthright and inheritance, and that our ancestors brought hither with them, upon their immigration, all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundation of the common law. The old congress, in the year 1774, unanimously resolved, that the respective colonies are entitled to the common law of England. 1 Story's Com. 140, and note.

The colony of Pennsylvania was settled about the year 1682; at which period, and down to the time of the case of Miller v. Taylor, 1769, the whole course of the British government, as well in parliament, as in the star chamber, and court of chancery, proceeded, in relation to the regulation of copyrights, upon the ground of an existing common law right in authors: and which was so universally acknowledged, that it was not contested in a court of justice until that case; and then solemnly, and upon the most mature deliberation, decided to be a common law right, notwithstanding the statute of Anne passed in the year 1710. And the subsequent decision of Donaldson v. Beckett, turned entirely upon the construction of that act, which it was supposed limited the remedy to the time prescribed in the act for the protection of the copyright. So that at the time of the settlement of Pennsylvania, and for nearly a century thereafter, the common law right with all the common law remedies attached to it, was the received and acknowledged doctrine in England. And if the common law was brought into Pennsylvania by the first settlers, the law of copyright formed a part of it, and was in force there, and has so continued ever since, not having been abolished or modified by any legislature in that state. But the existence of the common law in Pennsylvania, is not left to inference upon the general principles applicable to emigrants, before alluded to; there is positive legislation on the subject.

We find, as early as the year 1718, a law in that colony with a recital, "whereas king Charles II., by his royal charter to William Penn, for erecting this country into a province, did declare it to be his will and pleasure, that the laws for re-

gulating and governing of property, within the said province, as well for the descent and enjoyment of lands, as for the enjoyment and succession of goods and chattels, and likewise as to felonies, should be and continue the same as they should be, for the time being, by the general course of the law in the kingdom of England, until the said laws shall be altered by the said William Penn, his heirs and assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them: and whereas it is a settled point, that as the common law is the birthright of all English subjects, so it ought to be their rule in the British dominions. But acts of parliament have been adjudged not to extend to these plantations, unless they are particularly named as such: now, therefore," &c.: and certain statutes relating to crimes are adopted; and this question came under the consideration of the supreme court of that state, in the case of Morris's Lessee v. Van Dorin, 1 Dall. 64, in the year 1782, and Chief Justice M'Kean, in pronouncing the judgment of the court, says: this state has had her government for above a hundred years, and it is the opinion of the court, that the common law of England has always been in force in Pennsylvania. That all statutes made in Great Britain before the settlement of Pennsylvania, have no force here, unless they are convenient, and adapted to the circumstances of the country; and that all statutes made *since the settlement of Pennsylvania*, have no force here, unless the colonies are particularly named; and he adds, that the spirit of the act of 1718 supports this opinion.

With respect to English statutes which have been considered in force in Pennsylvania, we have the most satisfactory evidence in the report of the judges of the supreme court of that state, made under an act of the legislature passed April 7th, 1807, 3 Binn. 395, by which the judges were required to examine, and report, which of the English statutes are in force in that commonwealth; and upon this subject the report states: "with respect to English statutes, enacted since the settlement of Pennsylvania, it has been assumed, as a principle, that they do not extend here, unless they have been recognized by our acts of assembly, or adopted by long continued practice in courts of justice. Of the latter description there are very few; and those, it is supposed, were introduced from a sense of their

evident utility. As English statutes, they had no obligatory force; but, from long practice, they may be considered as incorporated with the law of our country."

From this review of the law, I think I have shown, that, by the common law of England, down, at least, to the decision in the case of Donaldson v. Beckett, an author was considered as having an exclusive right, in perpetuity, to his literary compositions. That this right, as a branch of the common law, was brought into Pennsylvania with the first settlers, as early as the year 1682. That whatever effect and operation the statute of Anne may have been deemed to have had upon the common law in England, that statute never having been in force in Pennsylvania, the common law right remains unaffected by it. And with this view of the law, and the rights of an author, I proceed to consider the acts of congress which have been passed on this subject.

Observing, in the first place, that we are bound to presume that congress understood the nature and character of this claim of authors to the enjoyment of the fruits of their literary labours, and the ground upon which it rested. This is useful and necessary, to conduct us to a right understanding of their legislation. A knowledge of the mischief is necessary, to a just and correct view of the remedy intended to be applied.

But the knowledge of congress on this subject is not left open to presumption. The question, as to its being an exclusive and perpetual right, was brought directly to the view of congress.

Three acts have been passed on this subject; and being not only in pari materia, but connected with each other by their very titles and objects, are to be construed together, and explained by each other.

The last act on the subject was passed in the year 1831, and is entitled "an act to amend the several acts respecting copyrights, approved February 3d, 1831." And the report of the judiciary committee, to whom the subject was referred, shows in what point of light the subject was presented to congress.

Your committee, says the report, believe that the just claims of authors, require from our legislation a *protection*, not less than what is proposed in the bill reported. From the first principles of proprietorship *in property, an author has an exclusive*

and perpetual right, in preference to any other, to the fruits of his labour. Though the nature of literary property is peculiar, it is not the less real and valuable. If labour and effort in producing what before was not possessed or known will give title, then the literary man has title, perfect and absolute, and should have his reward.

The object of the law, and to which the attention of congress was specially drawn, was the *protection* of property; claimed and admitted to be exclusive and perpetual in the author.

It may be useful, preliminarily, to notice a few of the settled rules by which statutes are to be construed.

In construing statutes, three points are to be regarded; the old law, the mischief, and the remedy; and the construction should be such, if possible, to suppress the mischief, and advance the remedy. 1 Bl. Com. 87; Bac. Ab. Stat. 1, pl. 31, 32.

An affirmative statute does not abrogate the common law.

If a thing is at common law, a statute cannot restrain it, unless it be in negative words. Plowd. 113; 2 Kent's Com. 462; 2 Mason 451; 1 Inst. 111, 115; 10 Mod. 118. Bac. Abr. Stat. 9.

Where a statute gives a remedy, where there was one by the common law, and does not imply a negative of the common law remedy, there will be two concurrent remedies. In such case, the statute remedy is accumulative. 2 Bac. 803, 805; 2 Inst. 200; Com. Dig. Action upon Statute 6.

Considering the common law right of the author established, and with these rules of construing statutes kept in view, I proceed to the consideration of the acts of congress.

The first law was passed in the year 1790 (1 vol. Story's ed. of Laws of United States 94), and is entitled, "an act for the encouragement of learning, by *securing* the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned."

The first section declares, that the author of any book or books already printed, being a citizen of the United States, and who hath not transferred the copyright to any other person, and any other person, being a citizen of the United States, &c. who hath purchased, or legally acquired the copyright of such book, in order to print, reprint, publish or vend the same, shall have the *sole right* and liberty of printing, reprinting, publishing and

vending the same, for fourteen years *from the recording the title thereof* in the clerk's office, as hereinafter directed. The like provision is made, with respect to books or manuscripts not printed, or thereafter composed. The title, and this section of the act, obviously consider and treat this copyright as property; something that is capable of being transferred; and the right of the assignee is protected equally with that of the author; and the object of the act, and all its provisions purport to be for *securing* the right. Protection is the avowed and real purpose for which it is passed. There is nothing here admitting the construction, that a new right is created. The provision in no way or manner deals with it as such. It in no manner limits or withdraws from the right, any protection it before had. It is a forced and unreasonable interpretation, and in violation of all the well settled rules of construction, to consider it as restricting, limiting or abolishing any pre-existing right. Statutes are not presumed to make any alteration in the common law, further or otherwise, than the act expressly declares. And, therefore, when the act is general, the law presumes it did not intend to make any alteration; for if such was the intention, the legislature would have so expressed it. 11 Mod. 148; 19 Vin. 512, Stat. E. 6, pl. 12. And hence the rule is laid down in Plowden, if a thing is at common law, a statute cannot restrain it, unless it be in negative words. It is in every sense an affirmative statute, and does not abrogate the common law.

The cumulative security or protection given by the statute, attaches *from the recording of the title of the book in the clerk's office of the district court where the author or proprietor shall reside.* If the statute should be considered as creating a new right, that right vests upon recording the title. This is the only prerequisite, or condition precedent, to the vesting the right. Whatever it is that is given by the statute, and the other requirements in the third and fourth sections, of publishing in the newspaper within two months from the date of the record, and delivering a copy of the book to the secretary of state within six months from the publication; cannot be construed as prerequisites or conditions precedent to the vesting. These provisions cannot be considered in any other light than as directory. In no other view can these sections of the law be

made consistent with the provisions of the first section. The benefit of the act, so far as respects the exclusive right, takes effect from the time of recording the title in the clerk's office: but the publication in the newspaper may be made at any time within two months, and the copy delivered to the secretary of state within six months. What would be the situation of the author if his copyright should be violated before the expiration of the time allowed him for these purposes? Would he have no remedy? The second section declares in terms, that if any person, from and after the *recording the title*, shall, without the consent of the author or proprietor, print or reprint, &c., he thereby incurs the penalties given by the act. Both the right and the remedy therefore given by the act, attach on the recording of the title. And this construction is not at all affected by any thing contained in the third section of the act; which declares that no person shall be entitled to the benefit of this act, unless he shall have deposited a printed copy of the title in the clerk's office. This is in perfect harmony with the first and second sections; and although the requirement to publish a copy of the record in the newspaper is in the same section, it is in a separate and distinct clause, and no more required to be considered a prerequisite, than if it was in a distinct section: and so it was considered by Mr Justice Washington in Ewer v. Coxe, 4 Wash. C. C. Rep. 490; and he also in that case considered the requirement in the fourth section to deliver a copy to the secretary of state as directory, and not as a condition: and indeed the result of his opinion was, that if the author's copyright depended upon the act of 1790, it would be complete by a deposite of a copy of the title in the clerk's office. But that the act of 1802 not only added another requisite, viz. causing a copy of the record to be inserted at full length in the title page, but made the publication in the newspaper, and the delivery of a copy of the book to the secretary of state, prerequisites, although not made so by the act of 1790. Mr Justice Washington is fully supported in his construction of the act of 1790 by the case of Nichols v. Ruggles, 3 Day 145, decided in the supreme court of errors of the state of Connecticut, where it is held, that the provisions of the statute, which require the author to publish the title of his book in a newspaper, and to deliver a copy of the work to the

secretary of state, are merely directory, and constitute no part of the essential requisites for securing the copyright. This case was decided in the year 1808, and I do not find any reference to the act of 1802. This can only be accounted for upon the supposition that, in the opinion of the counsel and court, this act did not at all affect the construction of the act of 1790; for had it been supposed that the act of 1802 made the publication in a newspaper, and a delivery of a copy of the work to the secretary of state, prerequisites to the vesting of the copyright, it would necessarily have led to a different result on the motion for a new trial. Judge Hopkinson, who tried the cause now before the court, thinks the act of 1790 will not admit of the construction given to it by Judge Washington; but that under that act the publication in a newspaper, and delivery of a copy of the work to the secretary of state, are prerequisites to the establishment of the right; and such I understand to be the opinion of a majority of this court, by which the construction of the act of 1790 by Judge Washington is overruled. I have already attempted to show that this construction of the act of 1790 cannot be sustained; nor do I think that the act of 1802 will aid that construction of the act of 1790, and in this I understand my brother M'Lean concurs: so that upon this question, as to the effect of the act of 1802 upon the act of 1790, the court is equally divided, and the decision of the cause rests upon the act of 1790. A brief notice, however, of the act of 1802, 2 Story's Ed. Laws U. S. 866, may not be amiss.

It purports so far as it relates to the present question, to be a supplement to the act of 1790, and declares that the author or proprietor of a book, before he shall be entitled to the benefit of that act, shall, in addition to the requisites enjoined in the third and fourth section of said act, give information, by causing a copy of the record, required to be published in a newspaper, to be inserted at full length in the title page or in the page immediately following the title page of the book. It is to be observed, that this purports to be a supplementary act, the office of which is only to add something to the original act, but not to alter or change the provisions which it already contains. It leaves the original act precisely as it was, and only superadds to its provisions the matter of the supplement; and

both, when taken together, will receive the same construction as if originally incorporated in the same act. This is the natural and rational view of the matter. Suppose this new requisite had been in the original act, how would it stand? If it was in a separate and distinct section, it would run thus: that the author, before he shall be entitled to the benefit of this act, shall insert at full length, in the title page of the book, a copy of the record of the title. This could not change the construction of the act as to the publication in the newspaper, or delivery of a copy of the book to the secretary of state. Nor could it have any such effect, if it followed immediately after the prerequisite of depositing a printed copy of the title of the book in the clerk's office; and this would have been the natural place for the provision, if it had been inserted in the original act.

Judge Washington, in Ewer v. Coxe, says that the supplemental act declares that the person seeking to obtain this right shall perform this new requisition, in addition to those prescribed in the third and fourth sections of the act of 1790, *and that he must perform the whole before he shall be entitled to the benefit of the act.* I find no such declaration in the act. The second section, which relates to prints, does contain this declaration, but it has no application to books.

If the act of 1802 is intended as a legislative construction of the act of 1790, and is clearly erroneous, it cannot be binding upon the court.

The act of 1831, being in pari materia, may be taken into consideration in construing the previous acts which it purports to amend; and we find in this act only two prerequisites imposed upon an author, to entitle him to the benefit of the act, viz. to deposit a printed copy of the title of the book in the clerk's office of the district court of the district wherein the author or proprietor shall reside, and to give information of the copyright being secured, by inserting on the title page, or the page immediately following, the entry therein directed, viz. "entered according to the act of congress," &c. And these being prerequisites under the former laws, it is fairly to be concluded that they were the only prerequisites, and that the other requirements are merely directory; and if so, the complainants in the court below, have shown all that the acts of

congress require to vest the copyright. The title has been recorded in the clerk's office, and a copy of the record inserted in the title page of the book.

But if the complainants in the court below have not made out a complete right under the acts of congress, there is no ground upon which the common law remedy can be taken from them. If there be a common law right, there certainly must be a common law remedy. The statute contains nothing in terms, having any reference to the common law right; and if such right is considered abrogated, limited or modified by the acts of congress, it must be by implication; and to so construe these acts, is in violation of the established rules of construction, that where a statute gives a remedy in the affirmative without a negative expressed or implied, for a matter which was actionable at common law, the party may sue at common law, as well as upon the statute. 1 Chitty's Pl. 144. This is a well settled principle, and fully recognized and adopted in the case of Almy v. Harris, 5 Johns. Rep. 175.

Whatever effect the statute of Anne may have had in England, as to limiting or abridging the common law right there; no such effect, upon any sound rules of interpretation, can grow out of our acts of congress. There is a wide difference in the phraseology of the laws. The statute of Anne contains negative words. It declares that the author shall have the sole right and liberty of printing, &c. for the time contained in the statute, and *no longer;* and these are the words upon which the advocates for the limitation of the common law right mainly rest: and it was, for a long time, considered by the ablest judges in England, that even these strong words did not limit or abridge the common law right; and the question, at this day, is not considered free from doubt.

This act, and the construction which it had received in England, were well known and understood when the act of congress was passed, and no such limitation is inserted or intended, or any matter at all repugnant to the continuance of the common law right, in its full extent. These laws proceed on the ground that the common law remedy was insufficient to protect the right, and provide additional security, by means of penalties, for the violation of it. Congress having before them the statute of Anne, and apprized of the doubt entertained in

England as to its effect upon the common law right, if it had been intended to limit or abridge that right, some plain and explicit provision to that effect would doubtless have been made; and not having been made, is, to my mind, satisfactory evidence that no such effect was intended.

If the present action was to recover the penalties given by the statute, it might be incumbent on the appellants to show that all the requirements in the acts of congress had been complied with. This would be resorting to the new statutory remedy, and the party must bring himself within the statute, in order to entitle him to that remedy. But admitting that the right depends upon the statute, and is limited to the time therein prescribed, the remedy by injunction continues during that time. This is admitted by Mr Justice Yeates, in Miller v. Taylor. The author, says he, has certainly a property in the copy of his book, during the term the statute has allowed; and whilst that term exists, it is like a lease, a grant or any other common law right; and will equally entitle him to all common law remedies for the enjoyment of that right. He may, I should think, file an injunction bill to stop the printing. But I may say with more positiveness, he might bring an action to recover satisfaction for the injury done, contrary to law, under the statute. And the same doctrine is laid down by the whole court, in Beckford v. Wood, 7 Term Rep. 616. Lord Kenyon says: the statute vests the right in authors for certain periods; and within those periods, the act says, the author shall have the sole right and liberty of printing, &c.; and the statute having vested the right in the author, the common law gives the remedy, by action on the case for a violation of it; and that the act, by creating the penalties, meant to give an accumulative remedy.

The language in the statute of Anne, which is considered as vesting the right, is the same as in the act of congress. In the former, it is considered as necessarily implied in the declaration that the author shall have the *sole right* during such time, &c. And in the act of congress, there is the same declaration, that the author shall have the *sole right* of printing, &c. from the time of recording the title in the clerk's office. The right being thus vested at the time, draws after it the common law remedy. And there is no more reason for

contending, that the remedy given by the statute, supersedes the common law remedy under the act of congress, than under the statute of Anne. The statute remedy is through the means of penalties in both cases.

The term for which the copyright is secured in the case now before the court has not expired; and according to the admitted and settled doctrine in England, under the statute of Anne, the common law remedy exists during that period.

Upon the whole, in whatever light this case is viewed, whether as a common law right or depending on the act of congress, I think the appellants are entitled to the remedy sought by the bill; and that the decree of the court below ought to be reversed, the injunction made perpetual, and an account taken according to the prayer in the bill, without directing an issue to try any matter of fact, touching the right.

Mr Justice BALDWIN also dissented from the opinion of the court.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Pennsylvania, and was argued by counsel; on consideration whereof, it is ordered, adjudged and decreed by this court, that the judgment and decree of the said circuit court, in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said circuit court, with directions to that court, to order an issue of facts to be examined and tried by a jury, at the bar of said court, upon this point, whether the said Wheaton, as author, or any other person as proprietor, had complied with the requisites prescribed by the third and fourth sections of the said act of congress, passed the 31st day of May 1790, in regard to the volumes of Wheaton's Reports, in the said bill mentioned, or in regard to one or more of them, in the following particulars, viz. whether the said Wheaton or proprietor did, within two months from the date of the recording thereof in the clerk's office of the district court, cause a copy of the said record to be published in one or more of the newspapers printed in the resident states, for four weeks; and whether the

said Wheaton or the proprietor, after the publishing thereof, did deliver or cause to be delivered to the secretary of state of the United States, a copy of the same, to be preserved in his office, according to the provisions of the said third and fourth sections of the said act, and that such further proceedings be had therein, as to law and justice may appertain, and in conformity to the opinion of this court.